

***United States Court of Appeals  
for the Second Circuit***



**JOINT APPENDIX**



76-7566

UNITED STATES COURT OF APPEALS  
*for the*  
SECOND CIRCUIT

DANIEL H. OVERMYER and SHIRLEY OVERMYER,  
Plaintiffs-Appellants,

-against-

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, THE STATE  
OF NEW YORK, THOMAS J. DELANEY, EDWARD A. PICHLER,  
and ANDREW R. TYLER,  
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

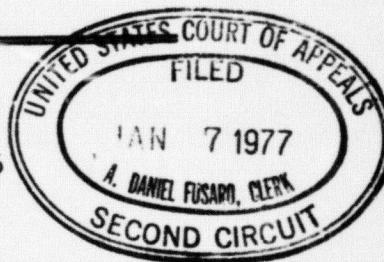
EASTON & ECHTMAN, P.C.  
Attorneys for Plaintiffs-Appellants  
6 East 39 Street, New York, N.Y. 10016  
(212) 683-5516

HENDLER AND MURRAY, ESQS.  
Attorneys for Defendant-Respondent,  
Fidelity and Deposit Company of Maryland  
15 Park Row, New York, N.Y. 10038  
(212) 964-4590

LOUIS J. LEFKOWITZ  
Attorney General of the State of New York  
Attorneys for Defendants-Respondents,  
New York State and Andrew R. Tyler  
2 World Trade Center, New York, N.Y. 10048  
(212) 488-3396

GERALD HARRIS, ESQ.  
Attorney for Defendant-Respondent,  
Thomas J. Delaney  
County Office Building, White Plains, N.Y. 10601  
(914) 682-2000

(5999)



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>Page</u>
Docket Entries.....	A-a
Complaint.....	A1
Answer of Thomas J. Delaney.....	A17
Motion for Preliminary Injunction .....	A23
Memorandum of Law in Support of Motion for Preliminary Injunction.....	A27
Memorandum of Law of Fidelity and Deposit Company of Maryland in Opposition.....	A37
Reply Memorandum .....	A60
Stipulation and Order Extending Time for Defendants State of New York and Andrew R. Tyler to Answer.....	A71
Motion to Dismiss Complaint.....	A72
Memorandum of Fidelity and Deposit Company of Maryland in Support of Motion to Dismiss Complaint.....	A106
Memorandum of Plaintiffs in Opposition.....	A114
Reply Memorandum .....	A121
Memorandum Decision Denying Motion for Preliminary Injunction and Dis- missing Complaint .....	A131
Notice of Appeal .....	A142

DOCKET ENTRIES

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DANIEL H. OVERMYER and SHIRLEY OVERMYER,  
Plaintiffs,  
- against -

United State Court  
: Southern District of  
New York

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, :  
THE STATE OF NEW YORK, THOMAS J. DELANEY, :  
EDWARD A. PICHLER and ANDREW R. TYLER,

Case No. 76 Civ.2876  
Judge POLLACK

Defendants.

Index to the Record on Appeal

Documents

Certified copy of the docket sheet	A
Certified copy of the docket sheet	B
Complaint	1
Stipulation and order extending time for defendant Fidelity and Deposit Company of Maryland to answer complaint	2
Answer of Thomas J. Delaney	3
Notice of Deposition	4
Stipulation and order extending time for defendant Fidelity and Deposit Company of Maryland to answer complaint	5
Summons and marshals return	6
Stipulation and order extending time for defendant Fidelity and Deposit Company of Maryland to answer complaint	7
Motion for Preliminary Injunction	8
Memorandum of Law in Support of Motion for Preliminary Injunction	9
Memorandum of Law of Fidelity and Deposit Company of Maryland in Opposition to Motion for Preliminary Injunction	10
Reply Memorandum	11
Stipulation and order extending time for defendants State of New York and Andrew R. Tyler to answer	12
Motion to Dismiss Complaint	13
Memorandum of Fidelity and Deposit Company of Maryland in support of Motion to Dismiss Complaint	14
Memorandum of Plaintiffs in Opposition to Motion to Dismiss	15
Memorandum decision denying motion for preliminary injunction and dismissing complaint	16
Notice of Appeal	17
Clerk's certificate	18
Reply Memorandum of Fidelity & Deposit Co., of Maryland in support of the motion to dismiss the complaint.	supp. rec.

COMPLAINT

76 Civ. 2876

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

X  
JUDGE POLLACK

DANIEL H. OVERMYER and  
SHIRLEY OVERMYER,

Plaintiffs,

Civil Action No.

- against -

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, THE STATE OF NEW YORK, THOMAS  
J. DELANEY, EDWARD A. PICHLER and  
ANDREW R. TYLER,

SUMMONS

Defendants.

X  
TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned and required to serve upon Easton  
& Echtman, P.C., attorneys for plaintiffs, whose address is  
6 East 39th Street, New York, New York 10016, an answer to  
the complaint which is herewith served upon you, within 20  
days after service of this summons upon you, exclusive of the  
day of service. If you fail to do so, judgment by default will  
be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT.

CLERK OF THE COURT

Dated: June , 1976.

JUN 29 1976

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

-----X

DANIEL H. OVERMYER and  
SHIRLEY OVERMYER,

CIVIL ACTION NO.

Plaintiffs,

- against -

COMPLAINT

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, THE STATE OF NEW YORK, THOMAS  
J. DELANEY, EDWARD A. SCHLER and  
ANDREW R. TYLER,

Defendants.

-----X

I.

PRELIMINARY STATEMENT

1. Plaintiffs seek to have this Court declare invalid and enjoin the enforcement of New York State Judiciary Law §§ 756, 757, 765, 767, 769, 770, 771, 772, 773, 774, and 775 (hereinafter referred to as "Sections 756, etc."), which are part of Article 19 dealing with contempt. These sections of the Judiciary Law deny plaintiffs herein, who are also the judgment-debtors in the hereinafter described action in the New York State Supreme Court, New York County, of equal protection of the laws and subject the judgment-debtors to cruel and unusual punishment in violation of the Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States. Moreover, the aforesaid sections' full force are almost always applied only to those

who cannot make payment on their judgments.

2. Plaintiff Daniel H. Overmyer also seeks a temporary restraining order and preliminary injunction against enforcement of the New York State Judiciary Law, Sections 756, etc., to prevent his commitment and apprehension by the Sheriffs of the State of New York.

3. Plaintiffs seek an award for damages incurred due to fraud, overreaching and misconduct of Fidelity in obtaining a New York State judgment against plaintiffs.

## II.

### JURISDICTION

4. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1343(3), (4) which provides for original jurisdiction of this Court in all suits authorized by 42 U.S.C. Section 1983 to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States and to declare unconstitutional and enjoin the New York State Judiciary Law, Sections 756, etc., as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

5. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. Sections 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

III.

THREE-JUDGE COURT

6. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. Section 2281 and 2284, since plaintiff Daniel H. Overmyer seeks an injunction to restrain defendants, some of whom are state officers, from the enforcement, operation and execution of the aforesaid state statutes of state-wide applicability on the ground that said statutes in this instance are contrary to the Constitution of the United States.

IV.

PLAINTIFFS

7. Plaintiff Daniel H. Overmyer is a citizen of the United States and the State of New York and presently resides at Hog Hill Road, Chappaqua, New York in the County of Westchester, with his wife, Plaintiff Shirley Overmyer and three of their children.

V.

DEFENDANTS

8. Upon information and belief, Defendant Fidelity and Deposit Company of Maryland (hereinafter referred to as "Fidelity" is an insurance corporation duly organized and existing under the laws of the State of Maryland, having offices and a place of business in the City, County and State of New York.

9. The State of New York is named as a defendant because this action questions the constitutionality of the New York State Judiciary Law, Section 756, etc. In such circumstances

notice must be given to the Attorney General and Governor of this state under 28 U.S.C. Annotated §2284(2).

10. Defendant Thomas J. Delaney is the Sheriff of Westchester County, State of New York, and Defendant Edward A. Pichler is the Sheriff of New York County, State of New York. As such, they have the duty pursuant to the New York State Judiciary Law, Sections 765, 767, 769, 770, 771, 772, 773, 774, and 775, to execute commitment orders in Westchester and New York Counties, respectively, State of New York and citizens of the United States.

11. Defendant Andrew R. Tyler is a Justice of the New York State Supreme Court, New York County, located at 60 Centre Street, New York, New York. As such, he has the authority pursuant to the New York State Judiciary Law, Sections 754, 756, 757, 765, 767, 769, 770, 771, 772, 773, 774, and 775 to issue orders of contempt, warrants of attachment and commitment. Defendant Andrew R. Tyler is a resident of the State of New York and a citizen of the United States.

## VI.

### FACTUAL ALLEGATIONS

12. On or about August 28, 1973, in the Justice Court of Dallas County, Texas, Precinct One, judgment was rendered in favor of Eliot Realty, Incorporated, against Overmyer Distribution Services, Inc., for possession of certain real property located in Dallas, Dallas County, Texas, and for costs of Court. An appeal bond with Fidelity was thereafter timely filed in Justice of the Peace Court No. 1 and said appeal was perfected by

OVERMYER DISTRIBUTION SERVICES, INC., to County Court at Law  
No. 2, under Cause No. 73-10102-B.

13. On October 11, 1973, said cause came on for trial in said County Court, and on October 12, 1973, said Court ruled that Eliot Realty, Incorporated should have possession of the premises described in its petition of and from OVERMYER DISTRIBUTION SERVICES, INC., and further ordered that OVERMYER DISTRIBUTION SERVICES, INC., pay Eliot Realty, Incorporated the sum of Twenty-eight Thousand, Ninety-two and 25/100 (28,092.25) Dollars plus interest and costs of Court. Said Court further ordered that Fidelity was liable as surety on the Appeal Bond.

14. To the said judgment by the Court, OVERMYER DISTRIBUTION SERVICES, INC., duly excepted and gave Notice of Appeal on October 12, 1973, and an Appeal Bond was duly filed with the Court on or about November 12, 1973. A copy of said judgment is attached hereto and marked Exhibit "A".

15. Thereafter, Fidelity, the alleged surety in said matter, through its attorney, undertook to urge the attorneys for OVERMYER DISTRIBUTION SERVICES, INC. (to-wit, Carrington, Coleman, Sloman, Johnson & Blumenthal) to continue in the appeal of said cause. Said attorneys would have otherwise withdrawn from representing OVERMYER DISTRIBUTION SERVICES, INC., in said case, in that said firm was withdrawing from the representation of OVERMYER DISTRIBUTION SERVICES, INC., in all cases in which it was representing OVERMYER DISTRIBUTION SERVICES, INC., at that time. Fidelity thereafter instructed Carrington, Coleman, Sloman, Johnson, & Blumenthal to attempt to settle said matter

with Eliot Realty, Incorporated. Fidelity further advised said attorneys that Fidelity would pay their fee if they continued in the case. OVERMYER DISTRIBUTION SERVICES, INC., was therefore from this point forward without legal representation. Moreover, its attorneys were retained by Fidelity to represent it. The Carrington, Coleman, Sloman, Johnson & Blumenthal firm has acknowledged that they represented Fidelity as is set forth herein.

16. Upon instructions from Fidelity, said attorneys did then and there undertake to settle said case for a 10% discount from the judgment rendered in said County Court. It was at the specific instructions of Fidelity through its attorneys that said case was settled by the OVERMYER DISTRIBUTION SERVICES, INC.'s former attorneys for Twenty-five Thousand, Two Hundred Eighty-three and 03/100 (\$25,283.03) Dollars on November 30, 1973. In addition, pursuant to the inducements and instructions of Fidelity and because of the compromise in settlement of said claim, and the impending payment of same by Fidelity, said Carrington, Coleman, Sloman, Johnson, & Blumenthal, Fidelity's new attorneys who were still the attorneys of record with the Court for OVERMYER DISTRIBUTION SERVICES, INC., filed a Motion to Dismiss the appeal to the Court of Appeals for the Fifth Supreme Judicial District on December 11, 1973. A copy of said Motion is attached hereto and marked Exhibit "B". No notice from Carrington, Coleman, Sloman, Johnson & Blumenthal or the Court was ever given OVERMYER DISTRIBUTION SERVICES, INC., that the appeal was to be withdrawn. Hence, Carrington, Coleman, Sloman,

Johnson & Blumenthal, by acting on behalf of Fidelity, deprived OVERMYER DISTRIBUTION SERVICES, INC., of its right to appeal by filing said Motion to Dismiss the appeal.

17. Further, plaintiffs Daniel H. Overmyer's and Shirley Overmyer's liability to Fidelity, if any, should have been limited to the terms set out in said Appeal Bond which did not apply to plaintiffs Daniel H. Overmyer or Shirley Overmyer individually. The Appeal Bond by its very own terms only applied to OVERMYER DISTRIBUTION SERVICES, INC., being liable as principal. No reference is made therein to plaintiffs Daniel H. Overmyer or Shirley Overmyer. Nevertheless, Fidelity filed suit against Plaintiffs Daniel H. Overmyer and Shirley Overmyer in the New York State Supreme Court, New York County under Index No.

aforesaid Texas action. A copy of said bond is annexed hereto and marked Exhibit "C". A judgment in the New York State Supreme Court was obtained by Fidelity against Plaintiffs Daniel H. Overmyer and Shirley Overmyer based upon the payment made by Fidelity to Eliot Realty, Incorporated, upon the aforesaid facts, and an indemnity agreement which Plaintiffs Daniel H. Overmyer and Shirley Overmyer signed with Fidelity in 1967, a copy of which is annexed hereto and marked Exhibit "D". The indemnity agreement applied to "D.H. Overmyer Co., Inc. (Ohio), and its subsidiaries and related companies as now are or may hereafter be constituted." However, OVERMYER DISTRIBUTION SERVICES, INC., was not in existence until 1971 nor is OVERMYER DISTRIBUTION SERVICES, INC., a subsidiary or a related company to D.H.

Overmyer Co., Inc. (Ohio). There is a real issue of whether this clause bound Plaintiffs herein to indemnify OVERMYER DISTRIBUTION SERVICES, INC., on the ground of unconscionability and whether it applies to OVERMYER DISTRIBUTION SERVICES, INC., at all.

18. The aforesaid issues relating to the direction and control by Fidelity of Overmyer Distribution Services, Inc.'s Texas attorneys, the settlement of the Texas action and the withdrawal of the Texas appeal were not known to Plaintiffs Daniel H. Overmyer and Shirley Overmyer during the proceedings prior to judgment in the afore said New York action instituted by Fidelity against Plaintiffs herein. The fact that Overmyer Distribution Services, Inc was not a subsidiary or a related company to D.H. Overmyer Co., Inc., was not known to the attorneys for the Overmyers during the aforesaid period.

19. After summary judgment had been entered on November 19, 1974, without a trial, in the New York State Supreme Court, New York County under the action entitled Fidelity and Deposit Company of Maryland v. Daniel H. Overmyer, Shirley Overmyer, and Overmyer Distribution Services, Inc., Fidelity, upon information and belief, caused a subpoena, dated December 2, 1974, to be served upon Plaintiff Daniel H. Overmyer, requesting his appearance for examination pursuant to supplementary proceedings of the New York action. On the adjourned date for his appearance, Plaintiff Daniel H. Overmyer failed to appear, since an appeal of said summary judgment was pending. In that appeal, plaintiffs argued their need to engage in discovery and disclosure pro-

ceedings to ascertain the facts behind the premature, improper, payment of the appeal bond by Fidelity in the Texas action. Plaintiff Daniel H. Overmyer's financial condition was such that he was unable to obtain an appeal bond to stay the supplementary proceedings to enforce the aforesaid judgment.

20. Defendant Fidelity moved to punish Plaintiff Daniel H. Overmyer for contempt. An order was signed granting said application unless Mr. Overmyer appeared for examination. The aforesaid appeal from the motion for summary judgment was still pending and Mr. Overmyer was still unable, as he is today, to obtain a bond to secure the judgment. Mr. Overmyer failed to appear and an order was signed adjudging Mr. Overmyer in contempt of Court, imposing a fine of \$250.00 plus \$10.00 costs and giving Mr. Overmyer an opportunity to purge his contempt by appearing for examinations.

21. Mr. Overmyer diligently paid the Court imposed fine and costs. However, he did not appear for the aforesaid resons. Defendant Fidelity moved by order to show cause for the issuance of an order of commitment, to have the Sheriff of any County of the State of New York wherein Plaintiff Daniel H. Overmyer may be found, apprehend said Plaintiff and compel him to appear for examination. On or about May 24, 1976, Mr. Justice Tyler signed an order of commitment directing a Sheriff to apprehend Mr. Overmyer and compel him to appear.

22. The punishment of apprehension and commitment by a Sheriff is violative of the Equal Protection clause of the

Fourteenth Amendment, in that, it works an invidious discrimination against those whose financial conditions are such that they are unable to post a bond to protect themselves from harrasment under the New York State Judiciary Law, Sections 755, etc. Plaintiff Daniel H. Overmyer is one who is in said situation with the additional factors of the misrepresentations and misconduct of Defendant Fidelity throughout the period involved herein. As a result of the aforesaid, Plaintiff Daniel H. Overmyer is faced with the imminent danger of apprehension by a Sheriff of the State of New York.

23. Plaintiff Daniel H. Overmyer contends that the apprehension by a Sheriff which may occur due to the aforesaid is in violation of the Eighth Amendment's ban upon cruel and unusual punishment as warranted in these circumstances.

24. Plaintiff Daniel H. Overmyer also contends that Defendant Fidelity subverted Overmyer Distribution Services, Inc.'s right to counsel in the Texas action which was the proximate cause of the circumstances in which he presently finds himself.

## VII

### FIRST CAUSE OF ACTION

25. Plaintiffs restate, reallege, and incorporate each and every allegation contained in paragraphs "1" through "24", inclusive, as though each was fully set forth herein.

26. The Fifth and Fourteenth Amendments to the United States Constitution provide that no State shall <sup>All</sup>

"deprive any person of life, liberty, or property without due process of law."

27. The New York State Judiciary Law, Article 19, which authorizes the defendants who are acting under color of state law to commit, apprehend and hold the Plaintiff Daniel H. Overmyer, is unconstitutional in that it has and shall deprive said plaintiff of his liberty and did deprive him of property without due process of law guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution by subjecting the said plaintiff to punishment by fine and apprehension by a Sheriff without affording the plaintiff the opportunity to fully discover and litigate the underlying transactions leading to a summary judgment and punishments pursuant thereto.

## VII

### SECOND CAUSE OF ACTION

28. Plaintiffs restate, reallege, and incorporate each and every allegation set forth in paragraphs "1" through "27", inclusive, as though fully set forth herein.

29. The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

30. The New York State Judiciary Law, Article 19, gives the courts the power in civil contempt proceedings to commit and apprehend individuals who do not have the financial ability to obtain and post bonds to protect themselves against punishment by fine or commitment and, as a result, the statute works an invidious discrimination against persons in financial difficulties without justification

in violation of the Fourteenth Amendment to the United States Constitution.

IX

THIRD CAUSE OF ACTION

31. Plaintiffs restate, reallege, and incorporate each and every allegation set forth in paragraphs "1" through "30", inclusive, as though fully set forth herein.

32. The Eighth Amendment of the United States Constitution provides that no person shall be subject to "cruel and unusual punishments."

33. The New York State Judiciary Law, Article 19, authorizes Defendants Thomas J. Delaney, Edward A. Pichler, and Andrew R. Tyler to commit, apprehend and hold individuals in civil contempt proceedings without justifiable cause in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

X

FOURTH CAUSE OF ACTION

34. Plaintiffs restate, reallege and incorporate each and every allegation contained in paragraphs "1" through "33", inclusive, as though each has been set forth at length herein.

35. The Fourth Amendment of the United States Constitution provides for the freedom from seizure of property except upon probable cause.

36. The New York State Judiciary Law, Article 19, authorizes the imposition of a fine which is to be paid over to the alleged aggrieved party under the direction of the court. Under the circumstances set forth above,

Defendant Fidelity is not an aggrieved party and the fine imposed upon Plaintiff Daniel H. Overmyer constitutes a wrongful seizure of property without probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

XI

FIFTH CAUSE OF ACTION  
AGAINST DEFENDANT FIDELITY

37. Plaintiffs restate, reallege and incorporate each and every allegation contained in paragraphs "1" through "24", inclusive, as though each has been set forth at length herein.

38. Defendant Fidelity falsely and fraudulently stated and represented to the New York State Supreme Court, New York County, that payment under the Appeal Bond in the underlying Texas action was made in good faith. Defendant Fidelity also withheld from said Court the circumstances relating to the direction and control by Fidelity of Overmyer Distribution Services, Inc.'s Texas attorneys, the settlement of the Texas action and the withdrawal of the Texas appeal.

39. The representation thus made by Fidelity was false and the aforesaid true facts were withheld by Fidelity.

40. Said representation so made was known by Fidelity to be false when made and was made with intent to deceive and defraud plaintiffs and the Supreme Court, New York County and to induce said court to render a judgment against plaintiffs.

41. Plaintiffs and the aforesaid Court at the time such representation was made, did not know the truth, but the Court believed the said representation to be true and

relied upon it and was thereby induced to render judgment in favor of Fidelity against plaintiffs.

42. As a result of the aforesaid plaintiffs have incurred damages.

## XII

### PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Honorable Court:

1. Assume jurisdiction of this cause, convene a three-judge district court pursuant to 28 U.S.C. § 2281 and 2284 to determine this controversy, and set this case down promptly for a hearing.

2. Pending a hearing and determination by the three-judge court, grant a temporary restraining order pursuant to 28 U.S.C. § 2284 (3) restraining defendants, their successors, agents and employees, and all persons in action concert and participation with them, from continuing to cause irreparable harm to Plaintiff Daniel H. Overmyer by enforcing civil contempt proceedings under Article 19 of the New York State Judiciary Law and threatening to commit and apprehend Plaintiff Daniel H. Overmyer.

3. Enter a final judgement pursuant to 28 U.S.C. §§ 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that New York State Statutes 756, 757, 765, 767, 769, 770, 771, 772, 773, 774, and 775 are invalid herein on the grounds that they are violative of provisions contained in the Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

4. Enter preliminary and permanent injunctions, pur-

suant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from enforcing civil contempt proceedings under Article 19 of the New York State Judiciary Law against plaintiffs herein.

5. Enter Judgment on behalf of plaintiffs in the amount of \$260.00 against defendant Fidelity the recipient of the fine unlawfully imposed in violation of the Fourth, Fifth, Eighth and Fourteenth Amendments.

6. Enter Judgment on behalf of plaintiffs against Fidelity in the sum of \$100,000.00 damages under the cause of action against Fidelity.

7. Pursuant to Rule 54. (d) of the Federal Rules of Civil Procedure, allow plaintiffs their costs herein and any and all additional or alternative relief, as may seem to this Court to be just, proper and equitable.

Respectfully submitted,

Easton & Echtman, P.C.  
Attorneys for Plaintiff  
6 East 39th Street  
New York, New York 10016  
Telephone No. (212) MU-3-5516

ANSWER OF THOMAS J. DELANEY

8/4/76

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x  
DANIEL H. OVERMYER and  
SHIRLEY OVERMYER,  
Plaintiffs  
Civil Action  
No. 76 CIV 2876

- against -

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND THE STATE OF NEW YORK,  
THOMAS J. DELANEY, EDWARD R. PICHLER  
and ANDREW R. TYLER,  
Defendants.

ANSWER

----- x  
THOMAS J. DELANEY, Sheriff of the County of  
Westchester, State of New York, by his attorney Gerald Harris,  
Esq., County Attorney for the County of Westchester for his  
Answer respectfully alleges as follows:

1. The Defendant is without knowledge or  
information sufficient to form a belief as to the truth of  
the averments contained in the Paragraphs numbered "7", "8",  
"12", "13", "14", "15", "16", "18", "24", "39", "40", "41"  
and "42" in the Complaint.

2. The Defendant is without knowledge or information  
sufficient to form a belief as to the truth of the averments  
of fraud, overreaching and misconduct contained in the  
Paragraph "3" in the Complaint.

3. As to the averments contained in the Paragraph numbered "10" in the Complaint, the Defendant admits that Section 770 of the Judiciary Law of the State of New York authorizes the increase of a warrant of commitment, and that Sections 757(2) and 759 of the Judiciary Law of the State of New York authorize warrants of attachment but denies that the duty of the Westchester County Sheriff to obey lawful mandates of a Court of proper jurisdiction arises specifically from these sections.

4. As to the averments contained in the Paragraph numbered "17" in the Complaint, the Defendant is without knowledge or information sufficient to form a belief as to the truth regarding information relevant to the corporate existence, affiliations, and/or connections of Overmyer Distribution Services, Inc.

5. As to the averment contained in the Paragraph numbered "17" in the Complaint concerning a real issue as to whether a certain indemnity agreement entered into by Plaintiffs applies to Overmyer Distribution Services, Inc., the Defendant is without knowledge or information sufficient to form a belief, but the Defendant notes that the very same question was presented to the Supreme Court of the State of New York

in an Order to Show Cause returnable on June 10, 1976 in Special Term, Part II. The name of that action was Fidelity and Deposit Company of Maryland v. Daniel H. Overmyer, Shirley Overmyer and Overmyer Distribution Services, Inc., Index No. 5920/74. Said Order was brought on upon the affidavit of the Plaintiff, Daniel H. Overmyer. The Defendant, Thomas J. Delaney, has never seen the results of this motion.

6. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments, contained in the Paragraph numbered "19" of the Complaint, regarding an appeal of a New York action being taken by the Plaintiff and regarding what actions, or non-actions, the taking of such appeal convinced the Plaintiff were proper.

7. The Defendant is without knowledge or information sufficient to form a belief as to the reasons stated in Paragraph "21" of the Complaint, why the Defendant did not appear to purge himself of contempt.

8. As to the allegations contained in Paragraph "22" of the Complaint, the Defendant denies that the execution of mandates issued pursuant to New York State

Judiciary Law, Sections 756, etc., causes harrasment against the Plaintiff or against any particular class of persons, including persons of modest financial means, and the Defendant denies ever having information or knowledge of any order or other mandate to commit the Plaintiff. The Defendant, Sheriff of the County of Westchester is without knowledge or information sufficient to form a belief as to the truth of the averments, regarding the Plaintiff's financial status, or the misconduct and misrepresentation of other persons. The Defendant denies any knowledge of any danger of apprehension facing the Plaintiff, and admits knowledge only of an Order directing that the Defendant be brought to Court.

6. The Defendant denies that bringing the Plaintiff into Court, as alleged in the Paragraph numbered "23" of the Complaint, would be in violation of the Plaintiff's rights under the Eighth Amendment of the Constitution of the United States of America.

7. The Defendant denies the allegation stated in Paragraph "27" of the Complaint that the New York State Judiciary Law was ever invoked to commit the Plaintiff to any institution as to hold him except insofar as is necessary in bringing him to court.

8. The Defendant denies that the New York State Judiciary Law, Article 19, denies the Plaintiff equal protection of the laws.

9. The Defendant denies that the New York State Judiciary Law, Article 19, has subjected the Plaintiff, or any other person, to cruel and unusual punishments in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States of America.

AS AND FOR A SEPARATE, DISTINCT  
DEFENSE DEFENDANT ALLEGES

10. On June 7, 1976 the Honorable Andrew R. Tyler, Justice of the Supreme Court, State of New York, signed an Order to Show Cause, returnable the 10th day of June, 1976 in an action entitled FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. DANIEL H. OVERMYER, SHIRLEY OVERMYER and OVERMYER DISTRIBUTION SERVICES, INC. Such an Order was brought on by Daniel H. Overmyer, the Plaintiff herein.

11. The Order to Show Cause noted in Paragraph 10 above, contained a stay prohibiting the Sheriff of the County of Westchester from taking any steps or proceedings in the enforcement of any judgment previously rendered in the above named action.

12. The Westchester County Sheriff's Office has not received notice that such stay has been modified, lifted or altered in any manner.

13. By virtue of the stay noted in Paragraph 11: above, the Sheriff of the County of Westchester is already prohibited from enforcing a contempt order against the Plaintiff, and thus, Thomas J. Delaney, Sheriff of the County of Westchester has been unnecessarily and improperly .. named as a party in this action.

WHEREFORE, the Defendant Thomas J. Delaney, Sheriff of the County of Westchester, State of New York, respectfully requests that he be dropped as a party to this action, or in the alternative, that the Plaintiffs prayers for relief be denied in all respects, and for such other and further relief as to the Court may seem just and proper.

Eugene E. Russell, Esq.  
Of Counsel

GERALD HARRIS, Esq.  
County Attorney for the County  
of Westchester  
County Office Building  
148 Martine Avenue  
White Plains, N.Y. 10601

MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2876

X  
: JUDGE POLLACK

DANIEL H. OVERMYER and SHIRLEY OVERMYER,

Plaintiffs,

- against -

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, THE STATE OF NEW YORK,  
THOMAS J. DELANEY, EDWARD A. PICKLER  
and ANDREW R. TYLER,

: MOTION FOR A  
PRELIMINARY  
: INJUNCTION

Defendants.

X

Plaintiff Daniel H. Overmyer, by his attorneys, Easton & Echtman, P.C., move the Court at 9:30 A.M. on the 17th day of September, 1976, or as soon thereafter as counsel may be heard, at Room , at the United States District Courthouse, Foley Square, New York, New York, for a preliminary injunction restraining the defendants, their successors, agents, employees, and all those acting in concert with them, from enforcement, operation and execution of New York State Judiciary Law, Article 19, Section 756, etc. as against plaintiff Daniel H. Overmyer; and from imposing any fines upon and/or apprehension of said plaintiff, pursuant to New York Judiciary Law, Article 19, Sections 756, etc. or any other New York State Statute which has the same or similar constitutional defects as the above sections of the Judiciary Law, pending the final disposition by the Supreme Court of the United States of the case of Juidice v. Vail, #75-1397.

Plaintiff Daniel H. Overmyer seeks this relief for himself

on the grounds that:

(a) He is threatened with imminent and irreparable injury in that he is subject to apprehension by a sheriff pursuant to an Order of Commitment, issued by defendant Tyler in compliance with New York Judiciary Law, Article 19, Sections 756, etc.;

(b) The issuance of a preliminary injunction will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury to plaintiff Daniel H. Overmyer;

(c) The New York Judiciary Law, Article 19, Section 756 etc. violates the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution;

(d) Plaintiff Daniel H. Overmyer has no adequate remedy at law, as set forth more fully in the verified complaint.

WHEREFORE, plaintiff prays that the Court issue the above-described preliminary injunction, and for such other, further and different relief as may be just and proper in the premises.

Dated: New York, New York  
September 13, 1976

EASTON & ECHTMAN, P.C.  
Attorneys for Plaintiffs  
Office & P.O. Address  
6 East 39th Street  
New York, New York 10016

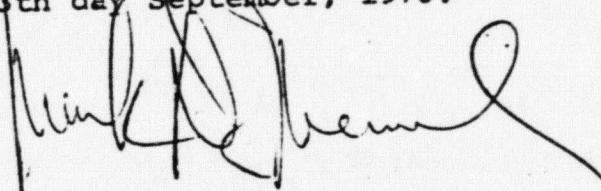
State of New York  
County of New York

BRUCE W. HESSELBACH, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Queens, New York.

That on the 13th day of September, 1976 at 15 Park Row, New York New York 10038 deponent served the within Motion for a Preliminary Injunction upon Hendler & Murray by delivering a true copy thereof to them personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorneys for Fidelity and Deposit Company of Maryland therein.

Bruce W. Hesselbach  
Bruce W. Hesselbach

Sworn to before me this  
13th day September, 1976.



MARK D. MERMEL  
Notary Public, State of New York  
No. 24-4609985  
Qualified in Kings County  
Term Expires March 30, 1977

STATE OF NEW YORK  
COUNTY OF NEW YORK

BRUCE W. HESSELBACH, being sworn, says:

I am not a party to this action; I am over 18 years of age;  
I reside at Queens, New York.

On September 13, 1976 I served the within Motion for a Preliminary  
Injunction upon Eugene E. Russell the attorney for Defendant  
Thomas J. Delaney in this action, at County Office Building  
White Plains, New York 10601 the address designated by said  
attorney for that purpose by depositing a true copy of same  
enclosed in a postpaid, properly addressed wrapper, in an official  
depository under the exclusive care and custody of the United  
States Postal Service within the State of New York.

Bruce W. Hesselbach  
Bruce W. Hesselbach

Sworn to before me this 13th  
day of September, 1976.

MARK D. MERMEL  
Notary Public, State of New York  
No. 24-460988  
Qualified in Kings County  
Term Expires March 30, 1977

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY  
INJUNCTION

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

-----x

DANIEL H. OVERMYER and SHIRLEY OVERMYER,

Plaintiffs,

-against-

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, THE STATE OF NEW YORK,  
THOMAS J. DELANEY, EDWARD A. PICKLER  
and ANDREW R. TYLER,

Defendants.

-----x

MEMORANDUM OF LAW

STATEMENT

This memorandum of law is submitted in support of plaintiff Daniel H. Overmyer's motion for a preliminary injunction.

FACTS

In a contempt proceeding for plaintiff Daniel H. Overmyer's failure to appear for examination pursuant to supplementary proceedings of a New York judgment obtained by defendant Fidelity and Deposit Company of Maryland

(hereinafter "Fidelity"), an order was signed adjudging said plaintiff in contempt of court and imposing a fine of \$250.00 plus \$10.00 costs.

Plaintiff Daniel H. Overmyer paid the fine plus costs. However, for the reasons set forth in the complaint herein, Mr. Overmyer did not appear for examination. Defendant Fidelity made a motion for an order of commitment, which was granted. Upon reargument of the motion, Mr. Justice Tyler of the N.Y. Supreme Court, New York County signed an order, dated July 24, 1976, which inter alia (1) adjudged him in contempt and (2) directed "that the Sheriff of any county to whom a certified copy of this order shall be delivered" should, "without further process, apprehend the said Daniel H. Overmyer" and compel him to appear for examination by defendant Fidelity.

POINT I

The principal issue herein arises from plaintiff Daniel H. Overmyer's challenge to Section 757 of the N.Y.S. Judiciary Law and Section 2308 of the N.Y.S. Civil Practice Law and Rules, on the ground that they deny due process.

Judiciary Law, §757, entitled "Order to show cause, or warrant to attach offender", provides, in relevant part:

"The court or judge, authorized to punish for the offense [neglect or refusal to obey court order], may,...upon being satisfied, by affidavit, of the commission of the offense,..."

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense." (emphasis added)

CPLR §2308(a) entitled "Disobedience of Subpoena," provides, in relevant part:

"Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court.... A court may issue a warrant directing a sheriff to bring the witness into court." (emphasis added)

A three-judge Federal constitutional court of the United States District Court for the Southern District of New York, held in Vail v. Quinlan, (74 Civ. 4773-LFM) 406 F. Supp. 951, that §§756, 757, 770, 772, 773, 774 and 775 of Article 19 of the N.Y.S. Judiciary Law violate the due process clause of the Fourteenth Amendment of the U.S. Constitution and, accordingly, are void and may no longer be enforced.

The questions herein are (1) whether the order to apprehend plaintiff Daniel H. Overmyer was issued pursuant to Judiciary Law, §757 or CPLR §2308(a) and (2) whether the ruling in Vail is equally applicable to CPLR, §2308(a) and should apply its reasoning to CPLR, §2308(a).

It should be noted that the determination in the Vail case has been stayed by Mr. Justice Thurgood Marshall, pending the determination of the appeal therefrom to the Supreme Court of the United States (N.Y.L.J., Feb. 19, 1976, p. 1, col. 2).

For present purposes it is not necessary to determine the correctness of the Vail decision, for that is the issue pending before the United States Supreme Court.

In Vail the court held that the statutory scheme supporting the civil contempt provisions of the Judiciary Law violate the due process clause. Specifically, (1) Sections 756, 757, 770, 773 and 774 permit an adjudication of contempt and order of imprisonment without an actual hearing; (2) Section 757 does not provide for adequate notice or warning of the consequences of failure to appear at the show cause hearing; (3) Sections 756, 770, 772 and 774 subject the debtor to imprisonment without informing him of his right to counsel and to assigned counsel if indigent; and (4) the fines and incarceration permitted under Sections 756, 770, 773 and 774 are punitive instead of coercive.

The statutory scheme outlined in Vail has been followed in the case at bar, as follows:

Upon service of a subpoena the judgment debtor must, under penalty of contempt, comply with its directions. In the event the judgment debtor fails to comply with the judgment creditor's subpoena, the CPLR provides that the debtor may be found in contempt and punished accordingly. Vail, supra at p. 956. However, the

"[p]rocedures by which a debtor is held in contempt are set out in the Judiciary Law and constitute the statutory scheme challenged here. If the debtor does not comply with the disclosure subpoena, an order requiring him to show cause why he should not be punished for contempt will issue solely upon the basis of an affidavit by the creditor's attorney showing the debtor failed to respond to the subpoena (§757(1)). If the debtor does not appear for a hearing upon the return date of the order to show cause, the court will make a final order directing that he be punished by fine or imprisonment (§§772, 770). The fine is an amount sufficient to indemnify the creditor for any loss or injury caused as a result of the debtor's contempt, or, if no loss or injury is shown, in an amount not exceeding costs plus \$250 (§773)." Vail, supra, at p. 956.

The scheme utilized by defendant Fidelity was pursuant to the above sections. However, Mr. Overmyer paid his fine of \$250 plus costs. Hence, defendant Fidelity moved pursuant to either Judiciary Law, §757(1) or CPLR §2308(a) to have the court issue a warrant of attachment, directed to the sheriff of any county, commanding him to arrest Mr. Overmyer and bring him before the court.

If this court maintains that defendant Fidelity proceeded pursuant to Judiciary Law, §757(1), said statute has been declared unconstitutional in Vail. Thus, defendant

Fidelity should not be permitted to proceed pursuant to said section, until the constitutional validity of the section is decided by the United States Supreme Court.

If, on the other hand, it is held that defendant Fidelity proceeded pursuant to CPLR §2308(a), then that section too should fall since said section parallels Judiciary Law §757(1) in the procedure for attachment of the offending person; and, thus, should be declared unconstitutional for violation of due process for the same reason §757 of the Judiciary Law was held unconstitutional, to wit, said sections do not provide for adequate notice or warning of the consequences of failure of judgment debtor to appear at the show cause hearing.

Hence, the N.Y.S. statutes pursuant to which defendant Fidelity proceeded and pursuant to which the order was issued to apprehend Mr. Overmyer, should be held unconstitutional.

Thus, the state court proceedings to enforce the New York judgment by defendant Fidelity against plaintiff Daniel H. Overmyer should be stayed pending the outcome of

the appeal of Vail to the Supreme Court of the United States.

Respectfully submitted,

Easton & Echtman, P.C.  
Attorneys for Plaintiffs

Irwin M. Echtman,  
Mark D. Mermel,  
Of Counsel.

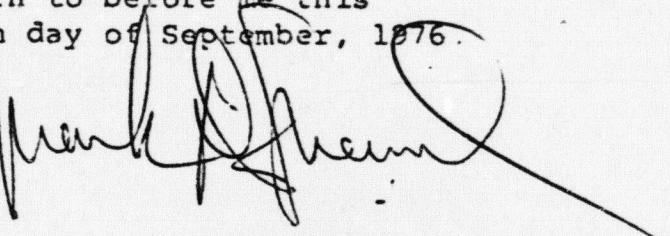
State of New York  
County of New York

BRUCE W. HESSELBACH, being duly sworn, deposes and says: that deponent is not a party to the action, is over 18 years of age and resides at Queens, New York.

That on the 13th day of September, 1976 at 15 Park Row, New York New York 10038 deponent served the within Memorandum of Law upon Hendler & Murray, by delivering a true copy thereof to them personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorneys for Fidelity and Deposit Company of Maryland therein.

Bruce W. Hesselbach  
Bruce W. Hesselbach

Sworn to before me this  
13th day of September, 1976.

  
MARK D. MERTEL  
Notary Public, State of New York  
No. 24-4609985  
Qualified in Kings County  
Term Expires March 30, 1977

State of New York  
County of New York

BRUCE W. HESSELBACH, being sworn, says:

I am not a party to this action; I am over 18 years of age;  
I reside at Queens, New York.

On September, 13, 1976, I served the within Memorandum of Law upon Eugene E. Russell the attorneys for Defendant Thomas J. Delaney in this action, at County Office Building White Plains, New York 10601 the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official deopsitar under the exclusive care and custody of the United States Postal Service within the State of New York.

Bruce W. Hesselbach  
Bruce W. Hesselbach

Sworn to before me this  
13th day of September, 1976.

MARK D. MERMEL  
Notary Public, State of New York  
No. 24-4609985  
Qualified in Kings County  
Term Expires March 30, 1977

MEMORANDUM OF LAW OF FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND IN OPPOSITION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

76 CIV. 2876

DANIEL H. OVERMYER and SHIRLEY OVERMYER,

M. P.

Plaintiffs,

- against -

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, THE STATE OF NEW YORK,  
THOMAS J. DELANEY, EDWARD A. PICHLER  
and ANDREW R. TYLER,

Defendants.

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This memorandum is submitted by Fidelity & Deposit Company of Maryland, defendant herein, in opposition to the motion made by plaintiff Daniel H. Overmyer for a preliminary injunction against the enforcement of the contempt provisions of the New York Judiciary Law, and in response to the memorandum of law submitted by plaintiff in support of his motion. The application of these statutes to Overmyer is by way of an order of Justice Andrew Tyler, defendant herein, made August 2, 1976, in an action in the Supreme Court of the State of New York, County of New York,

entitled "Fidelity & Deposit Company of Maryland, Plaintiff,  
v. Daniel H. Overmyer, Shirley Overmyer and Overmyer  
Distribution Services, Inc., Defendants."

STATEMENT OF FACTS

On November 19, 1974 pursuant to an order of Justice Nathaniel T. Helman granting it summary judgment, Fidelity & Deposit Company of Maryland entered judgment against Daniel H. Overmyer, Shirley Overmyer, and Overmyer Distribution Services, Inc., jointly and severally for the sum of \$27,973.83. A subpoena to examine Daniel H. Overmyer as to his assets and earnings was duly prepared and served upon him, requiring his attendance on January 17, 1975 at the offices of this firm. At the request of Overmyer's attorneys, his appearance was adjourned to March 17, 1975. At that time, Overmyer failed to appear for examination and his default was duly noted on the subpoena.

Judgment creditor then brought on a motion on notice to punish Overmyer for contempt, for failure to obey a lawful subpoena. Notice of this motion was personally served upon Overmyer. On the return date of the motion, May 6, 1975, Overmyer appeared by his attorneys and submitted papers in opposition to the motion. Justice George Postel granted that motion and found Overmyer in contempt of Court unless Overmyer appears for an examination on June 12, 1975. A copy of Justice Postel's order with notice of entry was duly served upon Overmyer's attorneys. On June 12, 1975

Overmyer failed to appear at the appointed time and place. On September 9, 1975, this firm served notice on Overmyer's attorneys that a Contempt Order would be submitted to Justice Postel on September 15, 1975. On September 30, 1975 Justice Postel signed an order adjudging Overmyer to be in contempt of court and imposed a fine of \$260.00, but directed that the Contempt Order be purged and the fine remitted if Overmyer appears for examination on October 29, 1975. A copy of the Contempt Order with notice of entry was duly served by mail upon Overmyer and his attorneys.

Overmyer demonstrated his receipt of the Contempt Order and also his contempt for the judicially imposed fine by making regular payments in the sum of \$25.00 per month commencing on October 16, 1975 until the amount of the fine was paid in full. On October 29, 1975 Overmyer failed to appear at the appointed time and place.

On January 21, 1976, Justice Irving Kirschenbaum signed an order to show cause directing Overmyer to show cause on February 3, 1976 "why an order should not be made directing the Sheriff of any County of the State of New York wherein Daniel H. Overmyer may be found to apprehend said Daniel H. Overmyer, the judgment debtor and compel him to appear at Special Term Part II for examination under oath by the

judgment creditor." Overmyer's attorneys appeared and submitted papers in opposition to this motion. However, the motion was granted. On June 2, 1976, pursuant to a decision dated April 30, 1976, an order was made adjudging Overmyer in contempt of Court, directing him to appear for examination and directing that "the Sheriff of any county to whom a certified copy of this order shall be delivered, shall forthwith, on receipt thereof, and without further process, apprehend the said Daniel H. Overmyer, the judgment debtor herein, and compel him to appear at a Special Term, Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for examination under oath by the judgment creditor herein at 10:00 A.M. on June 10, 1976." A copy of this order was duly served upon Overmyer and his attorneys.

On June 7, 1976 Overmyer, by his attorneys, obtained a stay of the enforcement of the judgment and an order directing Fidelity & Deposit Company of Maryland to show cause why Overmyer should not be granted leave to reargue the prior motion. This office appeared at the appointed time and after hearing the arguments of both sides, Justice Andrew Tyler denied Overmyer's motion for leave to reargue, by a decision dated June 23, 1976. By order dated

August 2, 1976, Justice Tyler vacated the stay imposed on June 7, 1976 and again directed that Overmyer appear for examination and further directed that "the sheriff of any county to whom a certified copy of this order shall be delivered, shall forthwith, on receipt thereof, and without further process, apprehend the said Daniel H. Overmyer, the judgment debtor herein, and compel him to appear at a Special Term Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for an examination under oath by judgment creditor herein, at 10:00 a.m. on August 31, 1976, or any court day thereafter until the said Daniel H. Overmyer shall actually be examined under oath by judgment creditor herein."

Thereafter plaintiff Overmyer commenced this action in the United States District Court for an injunction against the enforcement of Justice Tyler's order dated August 2, 1976 and for fraud damages against Fidelity & Deposit Company of Maryland. Overmyer thereafter brought on this motion for a preliminary injunction, returnable on September 24, 1976.

POINT I

PLAINTIFF IS NOT ENTITLED TO  
A PRELIMINARY INJUNCTION

Plaintiff Daniel H. Overmyer seeks a preliminary injunction restraining the enforcement of an order of the Supreme Court of the State of New York, by Justice Andrew Tyler, dated August 2, 1976, which provides in pertinent part:

"...Daniel H. Overmyer...be and he hereby is directed...to appear at a Special Term Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for examination under oath by judgment creditor herein, at 10:00 a.m. on August 31, 1976, and it is further

"ORDERED, that the Sheriff of any county to whom a certified copy of this order shall be delivered, shall forthwith, on receipt thereof, and without further process, apprehend the said Daniel H. Overmyer, the judgment debtor herein, and compel him to appear at a Special Term, Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for examination under oath by judgment creditor herein, at 10:00 a.m. on August 31, 1976, or any court day thereafter until the said Daniel H. Overmyer shall actually be examined under oath by judgment creditor herein."

Plaintiff claims that he is entitled to this relief under Vail v. Quinlan, 406 F. Supp. 951 (SDNY, 1976) a class action. Logically, plaintiff is either a member of the class of plaintiffs in Vail, or he is not such a member.

In either case, he is not entitled to the relief sought.

If plaintiff is included within the class of plaintiffs represented by Harry Vail, then enforcement of Judge Tyler's order may proceed. Plaintiff has no greater right than the other members of the class, against whom enforcement may proceed by virtue of the order of the Supreme Court of the United States by Justice Thurgood Marshall, dated February 12, 1976, a copy of which is appended hereto as appendix "A". By this order the enforcement of the injunction granted by the District Court was stayed pending the determination of the appeal. As a result, if plaintiff Overmyer is a member of the class of plaintiffs in Vail, it is respectfully submitted that no restraint may be placed on enforcement of the judgment against him, pending determination of the appeal in Vail.

If plaintiff Overmyer is not a member of the class of plaintiffs in Vail, then he must prove his entitlement to a preliminary injunction by reference to applicable law. The only relevant case cited by plaintiff in his memorandum is Vail. As set forth below, the decision in Vail, even if correct, is no basis for the relief plaintiff seeks.

It is clear that the operative facts in this case are substantially dissimilar to the facts in Vail.

The plaintiffs in Vail at the inception of the lawsuit, moved to convene a three judge court pursuant to 28 USC § 2281 and 2284. Judge Cannella granted this motion, upon a finding that the constitutional issues were substantial. 387 F. Supp. 630 (SDNY, 1975). Judge Cannella described the class of plaintiffs who raised substantial constitutional questions regarding the New York procedure for enforcement of judgments as follows:

"Each plaintiff (as well as the proposed plaintiff-intervenor) is a judgment debtor who has failed to respond to or comply with a post-judgment discovery subpoena. Each has been served with an order to show cause requiring that he demonstrate why he should not be adjudged in contempt of court for failure to obey such subpoena and each has failed to appear at the show cause hearing. Accordingly, each was adjudged in contempt of court and, upon failure to pay the fine specified by the County Court in its contempt order, has been incarcerated or subjected to an immediate threat of incarceration pursuant to an ex parte commitment order issued in compliance with § 756 of the Judiciary Law."

The differences between the situation of the plaintiffs in Vail and the plaintiffs herein are several and significant and preclude plaintiff from obtaining a preliminary injunction herein:

1. Overmyer did appear by attorney in response to the order to show cause and contested the issue of contempt.

2. Overmyer was found in contempt of court after this hearing.

3. Overmyer paid the fine of \$260.00 specified by the court; the order of Justice Tyler sought to be enjoined herein was not based upon any failure to pay the fine, but upon his failure to comply with a lawful subpoena and two court orders.

4. Overmyer is not subject to incarceration, but only to being compelled to testify.

5. The order compelling his appearance to testify was obtained on notice, after hearing and rehearing, not ex parte.

The facts in Vail, as recited by Judge Cannella, were crucial to the Court's decision of unconstitutionality, and since the most compelling facts are absent in the case at bar, no injunction is warranted.

The principal legal bases of the Vail decision were three:

1. That the statutes provided for punishment for civil contempt rather than coercion to enforce the court orders.

2. That the statutory scheme did not require that sufficient notice be given to the contemnor of the possibility of incarceration, and

3. That the plaintiffs were deprived of their right to counsel.

None of these three bases applies in the case at bar to support plaintiff's motion for a preliminary injunction.

The Court in Vail stated:

"Finally, although it is well established that judicial sanctions in civil contempt are proper to compensate the complainant for losses sustained or to coerce compliance with a court's order, the sanctions imposed under the challenged statutes are neither remedial nor coercive, but punitive."

It is clear from reading the order of Justice Tyler dated August 2, 1976 that this order is coercive and not punitive. It orders that Overmyer appear for examination (pursuant to subpoena and subsequent court orders) and directs the Sheriff to compel him to appear for such examination. This is clearly remedial in nature and there is no punishment involved.

In United States v. United Mine Workers of America,

330 U.S. 258 (1947) cited by the Court in Vail, a civil (and criminal) contempt proceeding, the Supreme Court held that it was a proper use of contempt proceedings to coerce compliance with a court order, in that case an injunction against a coal miners' strike. (330 U.S. at 303 - 304) Justice Douglas, in his concurring opinion, discussed the long history of contempt proceedings, and observed "Where the court exercises such coercive power, however, for the purpose of compelling future obedience, those imprisoned carry the keys of their prison in their own pockets." (330 U.S. at 331) This is true also of plaintiff Overmyer. He need only submit to examination under oath, for his contempt to be purged.

Thus, Justice Tyler's order which is plainly aimed at coercing plaintiff to comply with the subpoena and subsequent court orders, does not place an unconstitutional burden upon plaintiff, and no injunction is warranted.

Unlike the plaintiffs in Vail, plaintiff Overmyer received effective notice at every stage in the contempt proceeding and actually knew at all times of the sanctions that could be imposed for contempt. Despite this notice and knowledge, plaintiff continued to ignore the subpoena and court orders and wilfully and contumaciously refused to appear for examination. Justice Tyler, in his memorandum

decision dated June 23, 1976, stated:

"This Court finds the litany of evasion and non-compliance in which the defendant judgment debtor has engaged to be absolutely incredible. The utter disrespect . . . Overmyer has shown, not just for the prior or <sup>or</sup> of this Court, but for the entire system of jurisprudence by which this Court and this society operates is reprehensible."

Justice Tyler's above stated opinion was upon a motion, made on notice to Overmyer and his attorneys, to compel him to appear for examination. Therefore, the claim of lack of notice and lack of due process, upheld in Vail, may not be upheld herein, because Overmyer was given effective notice at every step.

Finally, unlike the plaintiffs in Vail, Overmyer may not claim that the contempt proceedings deprived him of his right to counsel. Overmyer was represented at all times relevant herein, and since at least April 1974, by Easton & Echtman, P.C., his attorneys herein, who appeared and opposed every application made by Fidelity & Deposit Company of Maryland culminating in Justice Tyler's order of August 2, 1976.

In summary, none of the factual or legal elements which compelled the Court in Vail to enjoin the contempt proceedings therein, apply to warrant such relief in the

case at bar. For that reason, plaintiff's motion for a preliminary injunction should be denied.

POINT II

THE COURT SHOULD ABSTAIN FROM  
THE DETERMINATION OF THIS CONTROVERSY

It is respectfully submitted that principles of comity and federalism dictate that the United States District Court abstain from the determination of this controversy, pending a final adjudication of the constitutional issues by the courts of the State of New York.

The law regarding Federal Court abstention from state civil contempt proceedings is set forth in Vail v. Quinlan, 406 Supp. 951 (SDNY, 1976). In that case, the Court rejected defendants arguments for abstention. However, two significant distinctions regarding abstention exist between Vail and the case at bar.

In Vail, plaintiffs never raised the constitutional issues presented therein in the state courts. 406 F. Supp. at 958. However, plaintiff Overmyer specifically opposed the motion by Fidelity & Deposit Company of Maryland for an order directing the sheriff to compel Overmyer to appear for examination, upon the ground that pertinent sections of the New York Judiciary Law were unconstitutional. A copy of the "Affirmation in Opposition" of Mark D. Mermel, dated March 4, 1976 is appended hereto as Appendix "B". Since

this issue was raised and litigated in the State Court, and determined adversely to Overmyer, it should not be relitigated herein, and the Court should abstain from such a determination. Overmyer's proper recourse from such order is by appellate or other reexamination in the courts of New York State.

The second distinction between Vail and the case at bar, as regards abstention, is that a constitutional construction of the statutes challenged herein has been suggested by the New York Courts since Vail.

In Walker v. Walker, \_\_\_ A.D. 2d \_\_\_, 381 NYS 2d 311 (Second Dept. 1976), the contemnor challenged the contempt provisions of New York Domestic Relations Law § 245, on the basis of the decision in Vail. The Court observed:

"...It is not necessary for us to determine the correctness of the Vail decision, for if in fact section 245 of the Domestic Relations Law does not on its face require adequate notice of possible imprisonment (and that is by no means clear), we should, in order to sustain its constitutionality, read such a requirement into it." at 311

Because it is evident from the foregoing that the New York Courts will read into the Judiciary Law such notice as will satisfy constitutional requirements, this Court should abstain

from striking these statutes down, until the New York Courts have had an opportunity to do so, or until Overmyer has exhausted his state remedies.

Because of the foregoing distinctions between Vail and the case at bar, this Court should abstain from the determination of this controversy at this time, and deny plaintiff's motion for a preliminary injunction.

CONCLUSION

For all the foregoing reasons plaintiff's motion for a preliminary injunction should be denied, and defendant Fidelity & Deposit Company of Maryland should be granted such relief as may be just and proper.

Respectfully submitted,

HENDLER & MURRAY  
Attorneys for Defendant  
Fidelity & Deposit Company  
of Maryland

ARTHUR LAMBERT  
JASON WALLACH  
Of Counsel

APPENDIX E

Stay of Order (February 12, 1976).

SUPREME COURT OF THE UNITED STATES

No. A-683

---

JOSEPH JUDICE, Etc., et al.,

Appellants

v.

---

HARRY VAIL, JR., et al.

---

ORDER

---

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the judgment of the United States District Court for the Southern District of New York, case No. 74 Civ. 4773, entered January 28, 1976, be and the same, is hereby stayed pending the timely docketing of an appeal in the above-entitled case.

Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the Southern District of New York is affirmed, this order is to terminate automatically.

*Appendix E.*

In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the sending down of the judgment of this Court.

/s/ THURGOOD MARSHALL  
Associate Justice of the Supreme  
Court of the United States

Dated this 12th  
day of February, 1976.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND,

: AFFIRMATION IN  
OPPOSITION

:

Plaintiff,

: Index No.: 5920/74

- against -

:

DANIEL H. OVERMYER, SHIRLEY OVERMYER,  
and OVERMYER DISTRIBUTION SERVICES, INC.,

:

Defendants.

-----X

MARK D. MERMEL, an attorney admitted to practice in  
the Courts of the State of New York, affirms under penalties  
of perjury pursuant to CPLR §2106, as follows:

1. I am associated with the firm of EASTON & ECHTMAN, P.C.  
attorneys for defendants, and make this affirmation in opposition  
to plaintiff's motion for an order of committment directing  
the arrest of Defendant Daniel H. Overmyer for an alleged civil  
contempt of Court.

2. On September 30, 1975, Mr. Justice Postel signed  
an order adjudging Daniel H. Overmyer in contempt of Court and  
imposed a fine of \$250.00 plus \$10.00 costs.

3. Defendant Daniel H. Overmyer has to date continuously  
made monthly installment payments of \$25.00, pursuant to the  
terms of payment of said fine set forth in Mr. Justice Postel's  
order. Thus, I do not understand Mr. Wallach's allegation

contained in paragraph "13" of his affirmation in support of the instant application, that Defendant Daniel H. Overmyer has "demonstrated . . . his contempt for the judicially imposed fine" by remitting his first payment.

4. On January 7, 1976, District Judge MacMahon wrote a decision on behalf of a three-judge court sitting in the United States District Court for the Southern District of New York, holding Sections 756, 757, 770, 772, 773, 774, and 775 of the New York Judiciary Law with regard to supplementary proceedings for collection of many judgments, void in violation of the due process clause of the Fourteenth Amendment. Said decision declared said sections unconstitutional and enjoined further application or enforcement of these sections. (Vail v. Quinlan, 74 Civ. 4773, N.Y.L.J., Jan. 16, 1976, P. 1, Col. 6). A copy of said decision is annexed hereto and marked Exhibit A.

5. The Attorney General of the State of New York moved in the U.S. District Court on behalf of the defendants for a stay of the three-judge court's order enjoining the operation of said statutes. The court upon hearing both sides issued an order, dated January 23, 1976, wherein it was ordered and adjudged "that Sections 756, 757, 770, 772, 773, 774, and 775, of the Judiciary Law of the State of New York are unconstitutional on their face". Further, the Court permanently enjoined "the operation of said statutes against plaintiffs and members

of their class, namely, all persons who have been or are presently subject to civil contempt proceedings pursuant to the above sections of the Judiciary Law." (Vail v. Quinlan , 74 Civ. 4773, 1976). A copy of said order is annexed hereto and marked Exhibit B.

6. In the above referred to case, Mr. Vail had been arrested for failure to pay the fine imposed for failure to appear for a Court ordered examination pursuant to supplementary proceedings. However, in the case at bar, Defendant Daniel H. Overmyer paid the fine ordered by this Court.

WHEREFORE, it is respectfully requested that this Court deny plaintiff's motion for an order of commitment directing the arrest of Defendant Daniel H. Overmyer, and for such other and further relief as this Court should deem just and proper.

Dated: New York, New York  
March 4, 1976

---

MARK D. MERTEL

REPLY MEMORANDUM

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

DANIEL H. OVERMYER and SHIRLEY OVERMYER,

Plaintiff,

76 Civ. 2876

M.P.

-against-

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, THE STATE OF NEW YORK,  
THOMAS J. DELANEY, EDWAPD A. PICHLER  
and ANDREW R. TYLER,

Defendants.

-----X

REPLY MEMORANDUM OF LAW

STATEMENT

This memorandum of law is further submitted in support of plaintiff's motion for a preliminary injunction and in reply to the memorandum of law submitted by defendant Fidelity and Deposit Company of Maryland (hereinafter "Fidelity"), in opposition to the instant application.

It should be first noted that defendant Fidelity does not deny that it proceeded herein under the statutory scheme of the Judiciary Law, which was the precise scheme which was held unconstitutional. On the contrary, defendant Fidelity outlines the procedure which they followed which

has been pursuant to the Judiciary Law.

Hence, the New York statutes pursuant to which defendant Fidelity proceeded and pursuant to which the order was issued to apprehend Mr. Overmyer, were held unconstitutional in Vail v. Quinlan. On that basis, the state court proceedings to enforce the New York judgment by defendant Fidelity against plaintiff Daniel H. Overmyer should be stayed pending the outcome of the appeal of Vail to the Supreme Court of the United States.

POINT I

THIS CASE FALLS WITHIN THE AMBIT  
OF VAIL, WHICH DECLARED THE NEW YORK  
STATE STATUTES, PURSUANT TO WHICH  
DEFENDANT FIDELITY HAS PROCEEDED,  
AS UNCONSTITUTIONAL.

In the Court's order in Vail v. Quinlan, dated January 23, 1976, the court permanently enjoined "the operation of said statutes [Judiciary Law, §§756, 757, 770, 772, 773, 775 and 775] against plaintiffs and members of their class, namely, all persons who have been or are presently subject to civil contempt proceedings pursuant to the above sections of the Judiciary Law." (See Exhibit "A" annexed hereto). Yet, defendant Fidelity attempts to create a class other than that ascertained to be the class in the determination in Vail. (See defendant Fidelity's memorandum of law, p.9).

Hence, Mr. Overmyer (a person subject to civil contempt proceedings pursuant to the Judiciary Law) is within the class to which Vail applies. As a member of said class, defendant Fidelity should not be permitted to subject him to civil contempt proceedings which have been declared unconstitutional.

Defendant Fidelity proceeds in its memorandum of law

to attempt to distinguish the instant procedure from that used in Vail. However, they both followed the same statutory scheme enumerated in the Judiciary Law, held unconstitutional in Vail.

In any event, the points which defendant attempts to distinguish (See defendant Fidelity's memorandum of law, p. 10) do not distinguish this case from the basis for the Court's declaration of unconstitutionality of the Judiciary Law.

Mr. Overmyer was found in contempt and pursuant to the Judiciary Law was fined \$250 plus \$10 costs. Vail has held such fine to be punitive and not coercive. Such was the case here. Also, the fact that Mr. Overmyer is subject to apprehension for failure to appear and not for failure to pay the fine, does not distinguish this case from the ruling in Vail. Vail declared Judiciary Law §757 unconstitutional. Said section provides for the apprehension of a judgment debtor for failure to appear pursuant to court order. Also, said section, pursuant to which defendant Fidelity has proceeded, addresses itself to a warrant of attachment, not incarceration.

Hence, although the instant case is not indentical to the extreme circumstances of Vail, it is clearly within the class applied in Vail when it declared the entire statutory scheme unconstitutional.

Defendant Fidelity next argues that the order to apprehend Mr. Overmyer is coercive and not punitive. Fidelity has completely missed the point in Vail. Vail held that the \$250 fine sanctioned by the Judiciary Law was punitive and not coercive. Said fine was levied against Mr. Overmyer. The reason for the unconstitutionality of Judiciary Law, §757 is not due to its punitive nature, but for its violation of due process.

Although the instant case does not present all the factual elements exhibited in the extreme case of Vail, it clearly falls within the ambit of the Vail decision, which declared the scheme by which defendant Fidelity has proceeded, to be unconstitutional.

As pointed out in the earlier memorandum of law in support of the instant application, plaintiff does not require this Court to determine the correctness of the Vail decision, since that is the issue pending before the United States Supreme Court. It is respectfully requested

that this Court stay the proceedings pursuant to the unconstitutional sections of the Judiciary Law, pending the outcome of Vail.

POINT II

THE MERITS OF UNCONSTITUTIONALITY  
OF THE NEW YORK STATUTES WERE  
NOT RAISED IN THE STATE COURT,  
THUS, THIS COURT SHOULD NOT BE  
BARRED FROM DETERMINING THIS  
CONTROVERSY.

Defendant Fidelity argues in Point II of its memorandum of law that Mr. Overmyer raised the constitutional issues herein in the state court, and thus should be estopped from relitigating them here. Hence, it concludes that this court should abstain from deciding any constitutional issues herein.

It is true that Mr. Overmyer pointed out to the state court that Vail stayed the operation of the sections pursuant to which defendant Fidelity has proceeded. However, defendant Fidelity pointed out to the state court that Mr. Justice Thurgood Marshall stayed the Vail decision. Thus, the constitutional issues raised in Vail were not adjudicated on their merits, therein, but the court merely proceeded under the Judiciary Law since the Vail decision was stayed.

That is the precise reason why plaintiff has sought

this relief in the District Court wherein it can argue on merits of vail, to stay the proceedings pursuant to the Judiciary Law, which has been declared unconstitutional.

CONCLUSION

THE NEW YORK STATUTES, PURSUANT TO WHICH DEFENDANT FIDELITY PROCEEDED AND PURSUANT TO WHICH THE ORDER TO APPREHEND PLAINTIFF DANIEL H. OVERMYER WAS ISSUED, WAS HELD UNCONSTITUTIONAL IN VAIL. THUS, THE PROCEEDINGS TO ENFORCE THE NEW YORK JUDGMENT SHOULD BE STAYED PENDING THE OUTCOME OF THE APPEAL OF VAIL.

Respectfully submitted,

Easton & Echtman, P.C.  
Attorneys for Plaintiffs

Irwin M. Echtman,  
Mark D. Mermel,  
Of Counsel.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

HARRY VAIL, JR. et al., : 74 Civ. 4773-LFM

Plaintiffs, :

-against- : ORDER

LAWRENCE M. QUINLAN, individually : (Three-Judge Court)  
and in his capacity as Sheriff of  
Dutchess County, et al., :

Defendants. :

S.D. of N.Y.  
JAN 22 1976  
432 Pg. 77

Defendants, Juidice and Aldrich, having moved for a stay of this court's order of January 7, 1976, declaring Sections 756, 757, 770, 772, 773, 774 and 775 of the Judiciary Law of the State of New York facially unconstitutional and enjoining the operation of said statutes against plaintiffs and members of their class, namely, all persons who have been or are presently subject to civil contempt proceedings pursuant to the above statutes; and the court having heard Louis J. Lefkowitz, Esq., Attorney General of the State of New York (by A. Seth Greenwald, Esq., Assistant Attorney General), attorney for defendants Juidice and Aldrich, in support of said motion, and Monroe County Legal Assistance Corp., Mid-Hudson Valley Legal Services Project (by John D. Gorman, Esq., Acting Project Director), attorney for plaintiffs, in opposition thereto, and having considered the pleadings, briefs and oral arguments on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss; and upon the briefs submitted and arguments made on defendants' motion for a stay; and

EXHIBIT A  
A69

MICROFILM

JAN 22 1976

MICROFILM

JAN 23 1976

It appearing that there is no genuine issue of any fact material to the resolution of plaintiffs' claim for a declaratory judgment and permanent injunctive relief, it is hereby

ORDERED AND ADJUDGED that partial summary judgment is granted in favor of plaintiffs, declaring that Sections 756, 757, 770, 772, 773, 774 and 775 of the Judiciary Law of the State of New York are unconstitutional on their face and permanently enjoining the operation of said statutes against plaintiffs and members of their class, namely, all persons who have been or are presently subject to civil contempt proceedings pursuant to the above sections of the Judiciary Law; and it is further

ORDERED AND ADJUDGED that this court's prior order of January 7, 1976 is so modified; and it is further

ORDERED AND ADJUDGED that defendants' application for a stay is in all respects denied.

Dated: New York, N. Y.

January 23, 1976

*J. Edward Lumbard (in 1f31)*  
HON. J. EDWARD LUMBARD, U.S.C.J.

*Lloyd F. MacMahon*  
HON. LLOYD F. MACMAHON, U.S.D.J.

*John M. Cannella*  
HON. JOHN M. CANNELLA, U.S.D.J.

JUDGMENT ENTERED - 1/28/76

*Raymond F. Burchardt  
CLERK*

-2-

A TRUE COPY  
RAYMOND F. BURCHARDT, Clerk

A70

By *Ed Belan*  
Deputy Clerk

STIPULATION AND ORDER EXTENDING TIME FOR DEFENDANTS  
STATE OF NEW YORK AND ANDREW R. TYLER TO ANSWER  
UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

-----X

DANIEL H. OVERMYER and SHIRLEY OVERMYER, :

Plaintiffs, :

-against- : STIPULATION

FIDELITY AND DEPOSIT COMPANY OF : 76 Civ. 2876  
MARYLAND, THE STATE OF NEW YORK, THOMAS : JUDGE POLLACK  
J. DELANEY, EDWARD A. PICHLER and :  
ANDREW R. TYLER, :  
:-----X

Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the  
Attorneys for the plaintiffs and the defendants State of New York  
and Mr. Justice Andrew R. Tyler to answer or move with respect  
to the complaint herein is enlarged to and including twenty days  
after the final disposition by the Supreme Court of the United  
States of the case of Judice v. Vail, #75-1397.

Dated: New York, New York  
September 7, 1976

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York

By

*A. Seth Greenwald*  
A. SETH GREENWALD  
Assistant Attorney General  
Attorney for State & Tyler  
Office & P.O. Address  
Two World Trade Center  
New York, New York 10047  
Tel. No. (212) 488-3396

EASTON & ECHTMAN, P.C.

By

*Mark D. Mermel*  
MARK D. MERTEL  
Attorneys for Plaintiffs

6 East 39th Street  
New York, New York 10016  
Tel. No. MU3-5516

SO ORDERED:

U.S.D.J.

MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

DANIEL H. OVERMYER and SHIRLEY  
OVERMYER,

76 CIV. 2876

Plaintiffs,

M. P.

- against -

NOTICE OF MOTION  
TO DISMISS  
COMPLAINT

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, THE STATE OF NEW YORK,  
THOMAS J. DELANEY, EDWARD A. PICHLER,  
and ANDREW R. TYLER,

Defendants.

-----x

S I R S :

PLEASE TAKE NOTICE, that upon the affidavit of \*\*\*  
Arthur N. Lambert, and the exhibits annexed thereto, and  
upon the memorandum submitted herewith, the undersigned will  
move this Court on the 15th day of October, 1976, at 2:00 p.m.  
in the afternoon of that day, or as soon thereafter as  
counsel may be heard, at Courtroom , United States  
Courthouse, Foley Square, New York, New York, for an order  
dismissing the complaint herein as against defendant,  
Fidelity & Deposit Company of Maryland, pursuant to  
FRCP 12 (b) (1) and 12 (b) (6), upon the grounds that the  
Court lacks jurisdiction of the subject matter, that the  
complaint fails to state a claim upon which relief can be  
granted, and that this action is barred by the principle of  
res judicata.

PLEASE TAKE FURTHER NOTICE, that pursuant to the direction of the Court, answering papers, if any, shall be served and filed on or before October 7, 1976.

Dated: New York, New York  
September 30, 1976

Yours, etc.,

HENDLER & MURRAY  
Attorneys for Defendant,  
Fidelity & Deposit Company  
of Maryland  
15 Park Row  
New York, New York 10038  
(212)-964-4590

TO: EASTON & ECHTMAN, P.C.,  
Attorneys for Plaintiff  
6 East 39th Street  
New York, New York 10016

Gerald Harris, Esq.  
Attorney for Defendant  
Thomas J. Delaney  
County Office Building  
White Plains, New York 10601

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DANIEL H. OVERMYER and SHIRLEY  
OVERMYER,

76 CIV. 2876

M. P.

Plaintiffs,

- against -

AFFIDAVIT

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, THE STATE OF NEW YORK,  
THOMAS J. DELANEY, EDWARD A. PICHLER  
and ANDREW R. TYLER,

Defendants.

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

ARTHUR N. LAMBERT, being duly sworn deposes and  
says that:

1. I am an attorney associated with the firm of  
HENDLER & MURRAY, attorneys for defendant, Fidelity and  
Deposit Company of Maryland (hereinafter referred to as  
"F & D"), and also attorneys for F & D in an action in the  
Supreme Court of the State of New York, County of New York,  
entitled "Fidelity and Deposit Company of Maryland, plaintiff  
v. Daniel H. Overmyer, Shirley Overmyer and Overmyer  
Distribution Services, Inc., defendants." As such I am  
familiar with the proceedings in both this action and

the action pending in the Supreme Court of New York. I make this affidavit in support of F & D's motion to dismiss the complaint herein as against F & D, upon the grounds that this Court should not and may not entertain this action, as the issues plaintiffs are attempting to litigate here have already been decided by another tribunal and may not be relitigated herein.

2. There are two main claims alleged in the complaint in this action: a constitutional claim and a claim for fraud damages against F & D. The fraud claim arises out of certain alleged acts of F & D in Texas in 1973, in connection with an action in the Texas State Courts entitled "Eliot Realty, Inc. v. Overmyer Distribution Services, Inc." The constitutional claim arises out of the aforementioned action in the Supreme Court of the State of New York, entitled "Fidelity & Deposit Company of Maryland v. Daniel H. Overmyer, Shirley Overmyer, and Overmyer Distribution Services, Inc."

#### THE TEXAS ACTION

3. In 1973, Eliot Realty, Inc. brought an action against Overmyer Distribution Services, Inc., to recover possession of real property, and recovered a judgment awarding the relief sought. Overmyer Distribution Services applied to F & D, which in reliance upon a general agreement of indemnity executed by Shirley and Daniel H. Overmyer, and upon the application of Overmyer Distribution Services, executed an appeal bond, and Overmyer Distribution Services thereafter perfected its appeal to the County Court of Dallas County.

Texas. That Court affirmed the judgment below, and also awarded to Eliot Realty, Inc., the value of the continued occupancy of the premises during the appeal in the sum of \$28,092.25. The County Court further directed that execution be had against Overmyer Distribution Services, Inc. and F & D. A copy of the County Court judgment is annexed hereto as Exhibit "A".

4. Thereafter, on December 7, 1973, F & D paid to Eliot Realty, Inc., the sum of \$25,535.85, in discharge of its liability on said bond and in satisfaction of the judgment rendered against it.

#### NEW YORK ACTION

5. F & D thereafter commenced an action for indemnity in the Supreme Court of the State of New York, County of New York against Daniel H. Overmyer, Shirley Overmyer and Overmyer Distribution Services. A copy of the complaint therein is annexed hereto as Exhibit "B". It is quite apparent from the complaint that the facts alleged by plaintiffs Overmyer in this action, in paragraphs 12 - 18 of the complaint herein, arise from the same facts and circumstances alleged in the complaint in the New York Supreme Court action.

6. In the New York action the defendant moved to dismiss the plaintiff's complaint and the plaintiff cross-moved for summary judgment. As evidenced by the affidavit of the defendant's attorney, Stanley Alex Schwartz, sworn to the 23rd day of July, 1974, a copy of which is annexed hereto as Exhibit "C", the defendant's attorney specifically

challenged the "good faith" of the plaintiff and the payment made by the plaintiff, alleging that there was an issue of fact "as to whether the surety company properly paid over to the party". (Schwartz affidavit p. 5)

7. The Supreme Court of New York per Justice

Nathaniel Helman held that the defendant's argument was clearly specious and in an opinion dated October, 1974, a copy of which is annexed hereto as Exhibit "D," the Court stated in pertinent part:

"No question exists as to plaintiff's obligation when it is named as a judgment debtor and execution is granted against it. This is not a case where it was solely the surety. In any event, defendants contracted to indemnify upon payment, whether plaintiff was liable for that payment or not. Defendants have no defense against contract obligation, and their attorney cannot create one by "surmise, conjecture and suspicion" (Shapiro v. Health Insurance Plan of Greater New York, 7 N Y 2d 56)."

A copy of the order of the Supreme Court of New York dated November 14, 1975, denying the defendant's motion to dismiss complaint and granting plaintiff's cross-motion for summary judgment is annexed hereto as Exhibit "E".

8. Overmyer appealed from the judgment entered November 19, 1974, to the Appellate Division, First Department where the judgment was affirmed unanimously on May 20, 1975. Overmyer moved in the Appellate Division for a stay of enforcement which motion was denied, and then moved to reargue the motion for a stay, which was also denied.

9. Overmyer moved for leave to appeal to the Court of Appeals, first in the Appellate Division and then

in the Court of Appeals, both of which motions were denied.

10. Overmyer then applied to the United States Supreme Court for an extension of time to petition for a

writ of certiorari, which application was denied. Overmyer has therefore exhausted his appeals from the judgment.

11. During the pendency of those appeals, Overmyer also moved in the Supreme Court, New York County, for a stay of enforcement pending the appeal, and to vacate the judgment upon the newly discovered evidence, to wit that the defendants were now claiming that they were not certain that they signed the indemnity agreement. Both of these motions were denied.

12. Your deponent respectfully submits that the defendants have already litigated the identical issues that they are attempting to relitigate herein and pursuant to principles of res judicata and or collateral estoppel and the full faith and credit clause of the United States Constitution, they are precluded from collaterally attacking the decision, orders and judgments rendered by the Courts of Texas and New York.

#### CONTEMPT PROCEEDINGS

13. At all times since the entry of the judgment against him on November 19, 1974, Daniel H. Overmyer has willfully refused to appear for examination to disclose his assets, despite a lawful subpoena served upon him pursuant to New York CPLR 5223. This contempt was the subject of two orders of the Supreme Court, New York County, dated

May 21, 1975 (Justice Postel), and September 30, 1975

(Justice Postel) which allowed Overmyer to purge his contempt by appearing on a specified date for examination.

14. This contempt is also the subject of two orders of defendant Justice Tyler which direct the Sheriff to compel Daniel H. Overmyer to appear for examination. Overmyer argued in opposition to the motion for the above mentioned order that the New York Judiciary Law sections, claimed by him to apply to his aforesaid contempt, were unconstitutional. This claim was considered, discussed and rejected by Justice Tyler. Having raised and litigated the constitutional issue in the New York State Court, Overmyer is precluded from raising it again in Federal Court.

#### JURISDICTION

15. Furthermore, the alleged constitutional claims arise exclusively out of Overmyer's contempt of the processes of law, provided by the New York CPLR for the enforcement of judgments, and not out of any alleged acts of F & D in Texas. Therefore, even if the Court finds that it has jurisdiction to hear the constitutional claims, there is no pendent jurisdiction of the damage claim, as it arises out of totally different proofs.

#### CONCLUSION

16. Plaintiff's constitutional and damage claims in this Court are barred by the principle of res judicata, and the damage claim, in addition is not within the subject

matter jurisdiction of this Court. Therefore these claims must be dismissed.

WHEREFORE, your deponent respectfully requests that an order be made dismissing the complaint herein as against defendant, Fidelity and Deposit Company of Maryland, and granting Fidelity and Deposit Company of Maryland such other and further relief as may be just and proper.

Sworn to before me this

1st, day of October, 1976.

*Arthur Lambert*  
ARTHUR N. LAMBERT

*Donald M. Lefari*  
DONALD M. LEFARI  
Notary Public, State of New York  
No. 41-71736C2  
Qualified in Queens County  
Cert. filed in New York County  
Commission Expires March 30, 1978

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----x  
FIDELITY & DEPOSIT COMPANY OF MARYLAND, :

Plaintiff, :

-against- :

DANIEL H. OVERMYER, SHIRLEY OVERMYER  
and OVERMYER DISTRIBUTION SERVICES, INC., :

COMPLAINT

Defendants. :

-----x

Plaintiff, by Hendler & Murray, its attorneys, for  
its complaint against the defendants, alleges, upon information  
and belief, as follows:

FOR A FIRST CAUSE OF ACTION

1. At all times hereinafter mentioned, plaintiff was  
and still is a corporation organized and existing under and by  
virtue of the State of Maryland and was and still is duly author-  
ized to transact business in the State of New York maintaining  
its principal office for such purpose at 110 William Street,  
City, County and State of New York.

2. That the defendant, Overmyer Distribution Services,  
Inc. is a domestic corporation with its office at 201 East 42nd  
Street, City, County and State of New York and is a subsidiary of  
or a related company of D. H. Overmyer Company, Inc., on whose

account the General Indemnity Agreement hereinafter described in this complaint is applicable.

3. On or about January 13, 1967, D. H. Overmyer Company, Inc. and the defendants, Daniel H. Overmyer and Shirley Overmyer duly executed and delivered to plaintiff their General Agreement of Indemnity in order to induce plaintiff from time to time to thereafter execute bonds, undertakings and/or obligations of suretyship on behalf of D. H. Overmyer Company, Inc. and its subsidiaries and related companies. A copy of said General Indemnity Agreement is hereto annexed marked Exhibit "A" and made a part hereof as though fully and at length herein set forth.

4. By the terms of said Indemnity Agreement marked Exhibit "A", the defendants, Daniel H. Overmyer and Shirley Overmyer, agreed among other things, to indemnify plaintiff against all loss, liabilities, costs, damages, attorneys fees and expenses of whatever kind or nature which the plaintiff may sustain or incur by reason of executing bonds on behalf of D. H. Overmyer Company, Inc. and/or its subsidiaries and/or related companies or in enforcing the terms of said Indemnity Agreement.

5. Thereafter on or about September 24, 1973, at the special instance and request of the defendant, Overmyer Distribution Services, Inc., a subsidiary or related company of D. H. Overmyer Company, Inc., plaintiff executed an appeal bond in favor of Eliot Realty Company, Inc., as obligee, wherein said defendant Overmyer Distribution Services, Inc. was principal and plaintiff herein was surety and by the terms of which appeal bond, plaintiff undertook, as surety, that the defendant Overmyer

Distribution Services, Inc. would prosecute its appeal with effect and would pay all costs and damages awarded against it. A copy of said Appeal Bond is hereto annexed marked Exhibit "B" and made a part hereof as though fully and at length herein set forth.

6. Plaintiff executed said appeal bond in consideration of the Indemnity Agreement executed by defendants, Daniel H. Overmyer and Shirley Overmyer, hereinbefore described and in reliance thereon.

7. Thereafter on or about October 12, 1973, the judgment which defendant Overmyer Distribution Services, Inc. had appealed from was affirmed and upon such affirmance, judgment was entered in favor of the obligee named in said bond, to wit, Eliot Realty Company, Inc. and against defendant Overmyer Distribution Services, Inc. in the sum of \$28,092.25 plus interest and costs and said judgment further provided that said Eliot Realty Company, Inc. have execution against defendant Overmyer Distribution Services, Inc. and against plaintiff as surety on said appeal bond. A copy of said judgment is hereto annexed marked Exhibit "C" and made a part hereof as though fully and at length herein set forth.

8. Thereafter, plaintiff, on or about December 7, 1973 by virtue of its liability under its said appeal bond and the judgment of affirmance hereinabove described, issued its check in the amount of \$25,535.86 to Eliot Realty Company, Inc. in full and final payment and in discharge of its liability under said bond.

9. Thereafter, plaintiff demanded of the defendants that they reimburse payment <sup>A83</sup> for the loss it sustained but def-

endants have failed and refused the same.

10. By reason of the claim made on said appeal bond, plaintiff was compelled to and did retain counsel to protect its interest and by reason thereof, plaintiff incurred legal expenses of \$992.85 on or about February 26, 1974.

11. Plaintiff has performed each and every part of said indemnity requirement required on its part to be performed.

FOR A SECOND CAUSE OF ACTION

12. Plaintiff repeats and reiterates each and every allegation contained in paragraphs "1" through "11" inclusive of this complaint as though fully and at length herein set forth.

13. That by reason of the failure and refusal of the defendants, Daniel H. Overmyer and Shirley Overmyer, to indemnify plaintiff for its loss and expense pursuant to their General Indemnity Agreement, plaintiff has been compelled to engage counsel to commence this action against said defendants to enforce the terms of said General Indemnity Agreement.

14. By reason of the above, plaintiff will incur additional legal expenses of \$9,000.00 for which sum defendants are indebted to plaintiff under and pursuant to the terms of said General Indemnity Agreement.

15. By reason of the facts above alleged, defendants are indebted to plaintiff, jointly and severally, in the aggregate sum of \$35,528.71 and appropriate interest no part of which has been paid although duly demanded.

WHEREFORE, plaintiff demands judgment against the

defendants, jointly and severally, for the sum of \$35,528.71 with interest on the sum of \$25,535.86 from December 7, 1973 and with interest on the sum of \$992.85 from February 26, 1974 together with the costs and disbursements of this action.

HENDLER & MURRAY  
Attorneys for Plaintiff  
15 Park Row  
New York, New York 10038  
(212) 964-4590

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----x  
FIDELITY & DEPOSIT COMPANY OF MARYLAND, :

Plaintiff, :

-against- :

COMPLAINT

DANIEL H. OVERMYER, SHIRLEY OVERMYER  
and OVERMYER DISTRIBUTION SERVICES, INC., :

Defendants. :

-----x  
Plaintiff, by Handler & Murray, its attorneys, for  
its complaint against the defendants, alleges, upon information  
and belief, as follows:

FOR A FIRST CAUSE OF ACTION

1. At all times hereinafter mentioned, plaintiff was  
and still is a corporation organized and existing under and by  
virtue of the State of Maryland and was and still is duly author-  
ized to transact business in the State of New York maintaining  
its principal office for such purpose at 110 William Street,  
City, County and State of New York.

2. That the defendant, Overmyer Distribution Services,  
Inc. is a domestic corporation with its office at 201 East 42nd  
Street, City, County and State of New York and is a subsidiary of  
or a related company of D. H. Overmyer Company, Inc., on whose

account the General Indemnity Agreement hereinafter described in this complaint is applicable.

3. On or about January 13, 1967, D. H. Overmyer Company, Inc. and the defendants, Daniel H. Overmyer and Shirley Overmyer duly executed and delivered to plaintiff their

General Agreement of Indemnity in order to induce plaintiff from time to time to thereafter execute bonds, undertakings and/or obligations of suretyship on behalf of D. H. Overmyer Company, Inc. and its subsidiaries and related companies. A copy of said General Indemnity Agreement is hereto annexed marked Exhibit "A" and made a part hereof as though fully and at length herein set forth.

4. By the terms of said Indemnity Agreement marked Exhibit "A", the defendants, Daniel H. Overmyer and Shirley Overmyer, agreed among other things, to indemnify plaintiff against all loss, liabilities, costs, damages, attorneys fees and expenses of whatever kind or nature which the plaintiff may sustain or incur by reason of executing bonds on behalf of D. H. Overmyer Company, Inc. and/or its subsidiaries and/or related companies or in enforcing the terms of said Indemnity Agreement.

5. Thereafter on or about September 24, 1973, at the special instance and request of the defendant, Overmyer Distribution Services, Inc., a subsidiary or related company of D. H. Overmyer Company, Inc., plaintiff executed an appeal bond in favor of Eliot Realty Company, Inc., as obligee, wherein said defendant Overmyer Distribution Services, Inc. was principal and plaintiff herein was surety and by the terms of which appeal bond, plaintiff undertook, as surety, that the defendant Overmyer

Distribution Services, Inc. would prosecute its appeal with effect and would pay all costs and damages awarded against it. A copy of said Appeal Bond is hereto annexed marked Exhibit "B" and made a part hereof as though fully and at length herein set forth.

6. Plaintiff executed said appeal bond in consideration of the Indemnity Agreement executed by defendants, Daniel H. Overmyer and Shirley Overmyer, hereinbefore described and in reliance thereon.

7. Thereafter on or about October 12, 1973, the judgment which defendant Overmyer Distribution Services, Inc. had appealed from was affirmed and upon such affirmance, judgment was entered in favor of the obligee named in said bond, to wit, Eliot Realty Company, Inc. and against defendant Overmyer Distribution Services, Inc. in the sum of \$28,092.25 plus interest and costs and said judgment further provided that said Eliot Realty Company, Inc. have execution against defendant Overmyer Distribution Services, Inc. and against plaintiff as surety on said appeal bond. A copy of said judgment is hereto annexed marked Exhibit "C" and made a part hereof as though fully and at length herein set forth.

8. Thereafter, plaintiff, on or about December 7, 1973 by virtue of its liability under its said appeal bond and the judgment of affirmance hereinabove described, issued its check in the amount of \$25,535.86 to Eliot Realty Company, Inc. in full and final payment and in discharge of its liability under said bond.

9. Thereafter, plaintiff demanded of the defendants

that they reimburse payment for the loss it sustained but defendants have failed and refused the same.

10. By reason of the claim made on said appeal bond, plaintiff was compelled to and did retain counsel to protect its interest and by reason thereof, plaintiff incurred legal expenses of \$992.85 on or about February 26, 1974.

11. Plaintiff has performed each and every part of said indemnity requirement required on its part to be performed.

FOR A SECOND CAUSE OF ACTION

12. Plaintiff repeats and reiterates each and every allegation contained in paragraphs "1" through "11" inclusive of this complaint as though fully and at length herein set forth.

13. That by reason of the failure and refusal of the defendants, Daniel H. Overmyer and Shirley Overmyer, to indemnify plaintiff for its loss and expense pursuant to their General Indemnity Agreement, plaintiff has been compelled to engage counsel to commence this action against said defendants to enforce the terms of said General Indemnity Agreement.

14. By reason of the above, plaintiff will incur additional legal expenses of \$9,000.00 for which sum defendants are indebted to plaintiff under and pursuant to the terms of said General Indemnity Agreement.

15. By reason of the facts above alleged, defendants are indebted to plaintiff, jointly and severally, in the aggregate sum of \$35,528.71 and appropriate interest no part of which has been paid although duly demanded.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, for the sum of \$35,528.71 with interest on the sum of \$25,535.86 from December 7, 1973 and with interest on the sum of \$992.85 from February 26, 1974 together with the costs and disbursements of this action.

HENDLER & MURRAY  
Attorneys for Plaintiff  
15 Park Row  
New York, New York 10038  
(212) 964-4590

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----x  
FIDELITY & DEPOSIT COMPANY OF  
MARYLAND,

Plaintiff,

AFFIDAVIT IN REPLY  
AND IN SUPPORT OF  
MOTION TO DISMISS  
AND IN OPPOSITION  
TO MOTION FOR SUMMARY  
JUDGMENT.

-against-

Index No: 5920/74

DANIEL H. OVERMYER, SHIRLEY OVERMYER  
and OVERMYER DISTRIBUTION SERVICES, INC.,

Defendants.

-----x  
STATE OF NEW YORK )  
                      ) SS.:  
COUNTY OF NEW YORK)

STANLEY ALEX SCHWARTZ, being duly sworn, deposes and says,  
I am an attorney admitted to practice in the State of New York,  
associated with the firm of EASTON AND ECHTMAN, P.C., attorneys  
for defendants, and I submit this affidavit in support of and  
in reply to the motion to dismiss on the basis that the complaint  
does not state a cause of action, and in opposition to  
plaintiff's cross motion for summary judgment.

I

THE IMPROPRIETY OF THE MOTION  
FOR SUMMARY JUDGMENT

Plaintiff is improperly attempting to "cure" a palpably  
and fatally defective complaint, wherein no cause of action  
is stated, by submission of extraneous matter on the cross motion.

As is discussed in section II of this affidavit,  
there is an issue of fact evident from the supporting papers  
which is fatal to summary judgment and is equally fatal to the

improper attempt to switch causes of action in mid-stream.

The complaint, which is annexed to the supporting papers in both motions, bases the cause of action, for both primary liability pursuant to the bond, and secondary liability upon the indemnity agreement, on the affirmance by the Dallas County Court of the decision of the local Texas municipal court. Nowhere in the complaint is it stated that the appeal was dismissed or that the prosecution was, in any way, finalized. Plaintiff does not set forth any basis for liability in the complaint upon its authority to settle or adjust claims. Since it is a fundamental and elementary principle of the law of suretyship that a surety is liable to the third party on an appeal bond only after the appeal has been finally determined, the absence of allegations of a final determination of the appellate process is fatal to the complaint, and to the cause of action. Plaintiff does not dispute that an indemnitor's liability arises only after the principal liability arises. Plaintiff has neither requested from our office nor applied to the court for leave to amend the complaint.

It is also admitted by plaintiff, by submission of documentary and certified proof that the proceeding was submitted to a Texas Court of jurisdiction, superior to the Dallas County Court, and that the disposition by the Dallas County Court was not a final adjudication or termination of the appeal.

A party is obliged to frame/prayer for relief, and set forth the facts which comprise the alleged basis for the relief requested in his pleading. Plaintiff has failed to do this by not even deigning to refer to the proceedings which occurred subsequent to the disposition by the Dallas County Court in the complaint.

It is axiomatic that plaintiff could not recover upon inquest or trial on the basis of the complaint because no basis for its responsibility to pay on the appeal bond is presented. Therefore, the request for summary judgment, which necessitates that plaintiff prove his case by the same quantum of proof that is needed for inquest or trial, is improper were the request is predicated upon facts which are not alleged in a complaint, which are insufficient to grant the requested relief.

There is another rule of law which operates to preclude the granting of summary judgment. A party is obliged to frame his pleading so that the adversary party has fair and timely notice of the facts which are to be proved, as well as the facts which allegedly form the basis of the cause of action. The only formal notice of the finality of the appeal which defendants' attorneys have received is in the affidavit in support of the motion for summary judgment.

The requirement of notice of the facts of final disposition of the appeal is not an idle or technical one.

A93  
As is stated in the supporting affidavit and exhibits thereto,

plaintiff paid over on the appeal bond prior to the dismissal of the appeal. All of the facts and circumstances leading to the alleged responsibility of plaintiff-surety occurred in a distant state of the far west. Defendant, by reason of absence of the required notice of facts constituting the alleged cause of action, has had absolutely no opportunity to ascertain exactly what transpired in the Texas proceeding. Did plaintiff and the third party negotiate a settlement without notifying defendant? Was there a request for a stay of execution made in the Texas Court? Did the appeal automatically stay the judgment? When was the appeal filed in the Fifth Supreme Judicial Court? When was the motion to dismiss the appeal filed, before or after the surety paid the third party? All of these questions are most pertinent in that plaintiff is seeking to be compensated by individual indemnitors who were not directly involved, upon information and belief, in the Texas judicial proceedings. Certainly, it is not too much to request plaintiff, who seeks a substantial amount of money from the individuals, to give defendants and their attorneys the required notice of material and crucial factual occurrences so that a defense can be pleaded. Therefore the request for summary judgment is, to say the least, premature when facts which are extraneous to the pleading are submitted as the basis thereof.

## II

### THE QUESTION OF FACT

Because of the existence of a question of fact in this action, summary judgment cannot be granted even if a cause of action were set forth in the complaint. Plaintiff paid

over on the bond on or about December 7, 1973 as is stated in the affidavit in support of the motion and exhibit thereto.

An appeal was taken from the Dallas County Court to the Texas Court of Civil Appeals, and the proceeding in the higher tribunal was not dismissed until January, 1974, as is evidenced by exhibit "F" annexed to the affidavit in support of the motion for summary judgment. Therefore, it cannot be disputed that an appeal was pending at the same time that plaintiff paid upon the surety bond.

Plaintiff's attorney, in paragraph "13" of the supporting affidavit states that defendant is liable to the surety company on the theory that he signed a "general" indemnity agreement and sets forth paragraph "SECOND" of the agreement, which is annexed as exhibit "B" to the supporting affidavit.

A further reading of the indemnity agreement makes it clear that there is an issue of fact, extant in this action, as to whether the surety company properly paid over to the third party. In paragraph "FOURTH" of the agreement, plaintiff is given the right to settle and adjust all claims for which it is a surety, but the exercise of that right, as is set out in paragraph "FOURTH", is predicated upon the surety's acting "in good faith".

Therefore, a question of fact, in the very "proof" asserted in support of the motion for summary judgment, is extant in this action.

<sup>A95</sup>  
Numerous questions arise as to the activities of plainti

surety company in settling the claim, in "good faith" by payment to the third party during the pendency of a further appeal. Did plaintiff communicate with defendants' local counsel to ascertain whether or not the other appeal was to be prosecuted? Did defendants' attorneys apply for a stay pending appeal to the Texas Court of Civil Appeals? Did the third party commence execution upon the judgment before payment was made? These questions are all the more relevant once it is noted that the Dallas County Court affirmed the adverse decision in October, 1973 while plaintiff did not pay over on the bond until December, 1973. Did the filing of the appeal to the Court of Civil Appeals operate to stay, automatically all enforcement procedures under Texas law? Did plaintiff ascertain from defendant corporation, or its local counsel whether defendant planned a further prosecution of the appeal?

All of these issues of fact can be resolved prior to trial, after service of a responsive pleading, with more than sufficient time to move for summary judgment after a proper complaint has been submitted as is explained in section III. of this action.

### III

#### THE NEED FOR EXAMINATIONS BEFORE TRIAL

Because plaintiff has failed to set forth a cause of action against either the principal or indemnitor, defendants' attorneys have moved to dismiss the complaint. Consequently,

neither party has served/notice to take a pretrial deposition. All the issues of fact, outlined in Section II, which have arisen because of plaintiff's payment on an appeal bond during the pendency of appeal, can be resolved by pre-trial and statutory dictated examinations before trial. The issue of payment "in good faith" once it is asserted by means of a properly-framed pleading, can be resolved during the pre-trial examinations and plaintiff, if the facts and evidence elicited so warrant, can then move for summary judgment.

#### IV

##### THE INSUFFICIENCY OF THE AFFIDAVITS AND EXHIBITS SUBMITTED IN SUPPORT OF THE CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff's supporting affidavits and documentation, offered in support of the motion for summary judgment would be insufficient to warrant summary judgment even if a cause of action were contained in the complaint.

It is a fundamental principle of New York practice that an application for summary judgment is the accelerated equivalent of a trial, and, therefore, the movant is obliged to prove his case in the same manner as he is required to do after inquest or trial.

Plaintiff has failed to prove his prima facie case in his supporting papers. For example, a copy of the Dallas County Court judgment is annexed as an exhibit, but the copy is not a certified one. Since plaintiff claims that defendants' liability

ity arises from the judgment, the existence and effect of the sister-state judgment is an essential element of his *prima facie* case and must be proven by competent evidence.

The same holds true for the claim for attorneys' services. Exhibit "F" does not consist of the bill for attorneys' services and even if the bill were annexed, summary judgment, upon a cause of action for legal services, cannot be granted unless there is a breakdown as to amount of time and rate of compensation therefore incurred by the attorneys for the applicant. The same holds true for the alleged cause of action in the complaint as to expenditures for attorneys' services in the New York proceeding.

Despite plaintiff's bombardment of "proof" which is extraneous to the complaint, and is certainly not dispositive of the issue of fact arising from payment during the pendency of an appeal, plaintiff has not even submitted competent proof of a properly-pleaded cause of action.

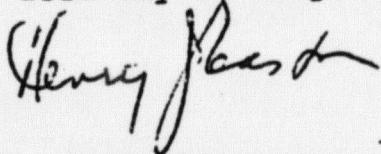
WHEREFORE, I request that the motion be granted and the cross-motion dismissed.



STANLEY ALEX SCHWARTZ

Sworn to before me this

23rd day of July, 1974.



HENRY J. EASTON  
Notary Public, State of New York  
No. 03-6136533  
Qualified in Bronx County  
Commission Expires March 30, 1976

## Opinion of the Court Below and Short Form Order

SUPREME COURT : NEW YORK COUNTY  
SPECIAL TERM : PART I

-----X  
FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Plaintiff,

-against-

Index No.  
8930/74

DANIEL H. OVERMYER, SHIRLEY OVERMYER  
and OVERMYER DISTRIBUTION SERVICES, INC.

Defendants.

-----X  
HELMAN, J.:

Defendants' motion, pursuant to CPLR 3211(a)(7), for dismissal of the complaint is denied, and plaintiff's cross-motion pursuant to CPLR 3211(c) for summary judgment is granted.

Plaintiff is a bonding company which executed an appeal bond on behalf of the corporate defendant in a Dallas, Texas appeal. The individual defendants signed an indemnity agreement which states in pertinent part:

"Fourth: That liability shall extend to, and include, the full amount of any and all moneys paid by the Company in the settlement or compromise of any claims, suits and judgments thereupon, in good faith, under the belief that it was liable therefor, whether liable or not, as well as any disbursements on account of costs, attorneys' fees and expenses as aforesaid, which may be made under the belief that such were necessary, whether necessary or not." (Emphasis supplied)

The Dallas appeal resulted in a judgment for damages against the corporate defendant and plaintiff, as surety, and

Opinion of the Court Below and Short Form Order  
execution of the judgment. There was a further appeal which was  
dismissed for lack of prosecution, the dismissal coming shortly  
after payment of the judgment by plaintiff.

Plaintiff is suing under the indemnity agreement for  
reimbursement for the amount of the judgment and counsel fees.  
Defendants seek to dismiss the complaint because plaintiff failed  
to allege that the judgment was final, and claim therefore that  
the complaint fails to state a cause of action. In opposing plaintiff's  
motion for summary judgment, defendants interpose "questions  
of fact" relating to plaintiff's "good faith" in paying the judg-  
ment and its legal expenses prior to the dismissal of the last  
appeal. It is supposedly a question of fact as to whether the  
appellant in the Dallas appeal (obviously the corporate defendant)  
sought a stay of execution of the judgment.

There is no affidavit by any of the defendants. Their  
counsel may raise questions, whether of fact or of law in Texas  
but his own clients are the best source of the answers. "No ques-  
tion exists as to plaintiff's obligation when it is named as a  
judgment debtor and execution is granted against it. This is not  
a case where it was solely the surety. In any event, defendants  
contracted to indemnify upon payment, whether plaintiff was liable  
for that payment or not. Defendants have no defense against their  
contract obligation, and their attorney cannot create one by  
"surmise, conjecture and suspicion" (Shapiro v. Health Insurance  
Plan of Greater New York, 7 N.Y.2d 56)."

Opinion of the Court Below and Short Form Order  
Settle order in accordance with the foregoing, including provisions for counsel fees within the terms of the indemnity agreement.

Dated: October 1974.

J.S.C.

## ORDER APPEALED FROM

AT a Special Term, Part I  
of the Supreme Court of the  
State of New York, held in  
and for the County of New  
York, at the Courthouse  
thereof on the 14<sup>th</sup> day of  
NOVEMBER, 1974.

PRESENT

Minute Book  
Nov 14, 1974

HON. NATHANIEL T. HELMAN

Justice.

FIDELITY &amp; DEPOSIT COMPANY OF MARYLAND,

Index No.  
5900/74

Plaintiff,

-against-

ORDERDANIEL H. OVERMYER, SHIRLEY OVERMYER  
and OVERMYER DISTRIBUTION SERVICES, INC.,

Defendants.

The defendants, Daniel H. Overmyer, Shirley Overmyer  
and Overmyer Distribution Services, Inc., having moved for an  
order dismissing plaintiff's complaint, pursuant to Rule 3211 (a)  
(7) of the Civil Practice Law & Rules upon the ground that the  
pleading fails to state a cause of action and the plaintiff  
having cross-moved for an order granting summary judgment in

## OrderAppealed From

favor of the plaintiff and against the defendants pursuant to Rule 3211 (c) on the grounds that the action is based on documentary evidence, that there are no triable issues of fact, and that plaintiff's cause of action has been established sufficiently to warrant the Court as a matter of law as directing judgment in its favor, and

UPON reading and filing the undated notice of motion with due proof of service thereof, the affidavit of Stanley Alex Schwartz, sworn to the 4th day of June, 1974, the affidavit of Stanley Alex Schwartz, sworn to the 23rd day of July, 1974 in support of the motion and in opposition to the cross-motion, the notice of cross-motion dated July 1, 1974, with due proof of service thereof, the affidavit of Michael J. Sugar, sworn to the 1st day of July, 1974, the affidavit of Arthur Lambert, sworn to the 2nd day of August, 1974 in support of the cross-motion and in opposition to the motion, and the motion having regularly come on to be held, and the parties having submitted, and the Court after due deliberation having rendered its decision in writing dated October 4, 1974,

NOW on motion of Handler & Murray, attorneys for the plaintiff it is

## OrderAppealed From

ORDERED that the defendants' motion be and the same hereby is denied in all respects, and it is further

ORDERED that the plaintiff's cross-motion be and the same hereby is granted in all respects, and it is further

ORDERED that the Clerk of the Court be and he hereby is directed to enter judgment in favor of the plaintiff Fidelity & Deposit Company of Maryland against the defendants, Daniel H. Overmyer, Shirley Overmyer and Overmyer Distribution Services, Inc., jointly and severally in the sum of \$26,418.71 with interest thereon from the 7th day of December, 1973 on the sum of \$25,535.86, and with interest from the 26th day of February, 1974 on the sum of \$992.85, together with the costs and disbursements of this action as taxed by the Clerk, and it is further

ORDERED that the second cause of action for attorneys fees be and the same is severed and continued, and it is further

ORDERED that the <sup>Calendar</sup> Clerk of ~~the Trial Court~~ of this Court upon receipt of a copy of this order with notice of entry be and he hereby is directed to <sup>appropriately assign</sup> ~~place~~ this matter ~~upon the~~ appropriate trial calendar upon the serving and filing of note

10

OrderAppealed From

of issue and the payment of proper fees therefor for an assessment  
of reasonable attorneys' fees.

E N T E R

S/N.C.H.

Justice of the Supreme Court

FILED

Nov. 15, 1974

N.Y.C.C.L.6.DFZ

JW:bc

MEMORANDUM OF FIDELITY AND DEPOSIT COMPANY OF MARYLAND  
IN SUPPORT OF MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
DANIEL H. OVERMYER and SHIRLEY  
OVERMYER,

76 CIV 2876

Plaintiffs,

M. P.

- against -

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, THE STATE OF NEW YORK,  
THOMAS J. DELANEY, EDWARD A. PICHLER,  
and ANDREW R. TYLER,

Defendants.

-----x  
MEMORANDUM OF LAW  
IN SUPPORT OF  
MOTION TO DISMISS

PRELIMINARY STATEMENT

This memorandum is submitted by Fidelity & Deposit Company of Maryland ("F & D") in support of its motion to dismiss the complaint herein. This motion was authorized by Judge Pollack upon the argument of plaintiff's motion for a preliminary injunction, on September 24, 1976. Judge Pollack directed that this motion be served by September 30, and that opposing papers be submitted by October 7, 1976.

There are two separate claims in the complaint: one is for injunctive relief from the enforcement of a contempt order of (defendant) Justice Tyler, of the Supreme Court of the State of New York, upon alleged constitutional grounds; the second is a claim for fraud damages against F & D. It is F & D's contention herein that the Federal Court has no subject matter jurisdiction with respect to the fraud claim and that both claims are barred by the doctrines of res judicata and finality of judgments.

STATEMENT OF FACTS

The facts underlying this action are set forth at length in the affidavit of Arthur N. Lambert submitted herewith, and will not be repeated herein.

POINT I

THIS COURT LACKS SUBJECT MATTER  
JURISDICTION OF THE CLAIM FOR  
DAMAGES.

The claim for damages by plaintiffs against F & D relates to the conduct of F & D in an action in Texas and in a subsequent action in New York. No diversity of citizenship is alleged, nor is any federal question presented by this claim. A Federal Court therefore has no jurisdiction to adjudicate this claim, except as an appendage to a claim over which the Federal Court has subject matter jurisdiction. It is respectfully submitted that no pendent jurisdiction exists.

Assuming for the purposes of argument that plaintiffs' alleged constitutional claim presents a federal question, the claim for damages is not sufficiently related to be within the Federal Court's subject matter jurisdiction. The constitutional claim arises from plaintiff Daniel H. Overmyer's contempt of the Supreme Court of the State of New York, and the orders and lawful processes thereof. All of the facts relating to the constitutional claim occurred in New York, on or after November, 1974, when judgment was entered against the Overmyers in the Supreme Court. The alleged basis of the claim for damages is in conduct of F & D in Texas, in 1973. Thus there are no material facts common to the two

claims.

The standard by which Federal Courts judge whether pendent jurisdiction exists is whether the two claims "derive from a common nucleus of operative fact."

United Mine Workers of America v. Gibbs, 383 US 715 (1966).

It is clear from the foregoing that plaintiffs' damage claim hereunder arises from facts which are entirely separate from the facts relating to plaintiff's constitutional claim.

For that reason, the claim for damages against F & D should be dismissed for lack of jurisdiction.

POINT II

PLAINTIFF'S CLAIMS ARE BARRED  
BY RES JUDICATA

As is stated in the complaint and in the affidavit of Arthur N. Lambert, submitted herewith, plaintiffs have already litigated with F & D, the issues and claims contained in this law suit. These issues and claims have been determined adversely to the Overmyers and have been merged into a judgment entered in favor of F & D and against the Overmyers, on November 19, 1974, in the Supreme Court of the State of New York, County of New York, a court of competent jurisdiction. Accordingly, these claims may not be relitigated herein and the judgment entered may not be collaterally attacked in this Court.

The principal of res judicata applies squarely to this action between the same parties (Daniel H. Overmyer, Shirley Overmyer and F & D) and upon the same issue (F & D's right to indemnity) as the prior action in the Supreme Court.

Res judicata denotes, in respect of a valid final judgment:

"That such a judgment when rendered on the merits, is an absolute bar to a subsequent action, between the same parties, or those in privity with them, upon the same claim or demand...The judgment operates as a bar--prevents relitigation of

all grounds for, or defenses to, recovery that were then available to the parties before the particular court rendering the judgment, in relation to the same claim--regardless of whether all grounds for recovery or defenses were judicially determined." 1B Moore's Federal Practice Para. 0.405(1) (1974)

In this action, plaintiffs merely rephrase the claim that F & D paid Eliot Realty, Inc. in bad faith, which was fully litigated and determined in the Supreme Court, New York County. Plaintiffs have recast this defense, which was found to be without merit, as a claim for damages, seeking to reverse the liability and judgment lawfully imposed upon them. This action is no more than a collateral attack on the judgment, after all direct attacks by way of appeals and by motions to vacate have failed. Therefore, this action as against F & D should be dismissed.

Similarly plaintiffs' constitutional claim based on Vail v. Quinlan was raised by Overmyer and determined by the Supreme Court, New York County, resulting in a final order of (defendant) Justice Tyler, dated June 4, 1976, which is conclusive and has res judicata effect herein. Overmyer directly attacked that order, in Supreme Court and obtained reargument, upon which the order was reinstated. No appeal has been taken from the June 4, order, and no collateral

attack is available herein.

In summary, both of plaintiffs' claims herein, for an injunction and for damages, are barred by res judicata, and may not be maintained herein. Therefore, the complaint herein must be dismissed.

CONCLUSION

For all the foregoing reasons, an order should be made dismissing the complaint herein as against F & D and granting F & D such other and further relief as may be just and proper.

Respectfully submitted,

HENDLER & MURRAY  
Attorneys for Defendant  
Fidelity & Deposit Company  
of Maryland

ARTHUR LAMBERT  
JASON WALLACH  
Of Counsel

MEMORANDUM OF PLAINTIFFS IN OPPOSITION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

DANIEL H. OVERMYER and : 76 Civ. 2876  
SHIRLEY OVERMYER, : M.P.

Plaintiffs,

- against - :

FIDELITY AND DEPOSIT COMPANY OF :  
MARYLAND, THE STATE OF NEW YORK, :  
THOMAS J. DELANEY, EDWARD A. PICHLER,  
and ANDREW R. TYLER, :

Defendants.

-----X

MEMORANDUM OF LAW

STATEMENT

This memorandum of law is submitted in opposition to defendant Fidelity & Deposit Company of Maryland's (hereinafter "Fidelity") motion to dismiss this action on the grounds of res judicata and lack of pendent jurisdiction over the fraud cause of action.

FACTS

As is more fully set forth in the complaint herein, this action alleges constitutional causes of actions and a cause of action against defendant Fidelity for obtaining a judgment against plaintiff's herein on the basis of fraud and over-reaching.

Defendant Fidelity's sole basis for the dismissal of the constitutional causes of action is that the issue has already been litigated in the New York State Supreme Court. Defendant Fidelity's bases for dismissal of the fraud claim are that it has also been litigated in the New York State Supreme Court and that pendent jurisdiction does not apply to this cause of action.

POINT I

THE CONSTITUTIONALITY OF THE NEW YORK STATUTES WERE NOT LITIGATED IN THE STATE COURT, THUS, RES JUDICATA DOES NOT APPLY. THEREFORE, THERE IS NO BASIS FOR DISMISSAL OF THE CONSTITUTIONAL CAUSES OF ACTION HEREIN.

It has been well settled by a multitude of cases that the doctrine of res judicata embodies the following:

A final judgment rendered by a court of competent jurisdiction on the merits is a bar to any further suit between the same parties or their privies, on the same cause of action. Tait v. Western Maryland Ry. Co., 53 S.Ct. 706, 289 U.S. 620, 77 L.Ed 405; Hummel v. Equitable Life Assurance Soc., 151 F. 2d 994; Wheeler v. Kleinschmidt, 149 F. 2d 161; Derrick v. City Counsel of Augusta, 138 F. 2d 507, Cert. Denied, 64 S. Ct., 619, 321 U.S. 767, 88 L.Ed 1071; Williamsberg Sav. Bank v. Bernstein, 277 N.Y. 11, 12 N.E. 2d 551.

Hence, the doctrine res judicata cannot possibly lie herein, since the causes of action herein on the constitutional claims were not litigated in the state court which concluded in a judgment. There was no constitutional cause of action

raised by either party herein in the state court.

The only time plaintiff Daniel H. Overmyer argued any issue that could be considered constitutional in nature was in opposition to Fidelity's motion to direct a sheriff to apprehend Mr. Overmyer and compel him to appear for examination. On the argument of that motion, Mr. Overmyer merely pointed out to the court that the decision in Vail v. Quinlan, stayed the operation of the sections pursuant to which defendant Fidelity has proceeded. However, defendant Fidelity pointed out to the state court that Mr. Justice Thurgood Marshall stayed the Vail decision. The underlying basis for the decision in Vail or the constitutional issues raised in the complaint herein were never raised by plaintiffs and were not litigated or adjudicated on their merits in any action between these parties herein. The court merely preceded under the judiciary law since the Vail decision had been stayed. The state court held that it "was not bound by Vail." (Decision of Mr. Justice Tyler, dated May 24, 1976).

Since there was no similar cause of action in the state court which had any constitutional issue, it is respectfully submitted that defendant Fidelity more pre-

cisely seeks to evoke the related doctrine of 'collateral estoppel'.

This is well explained in Com'r v. Sunnen, (1948), 68 S. Ct. 715, 333 U.S. 591, 597-598, 92 L.Ed 898, wherein the court, after pointing out the res judicata effect of a judgment as to the same cause of action, continued:

"But where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered'. Cromwell v. County of Sac[94 US 351], 353. And see Russell v. Place, 94 US 606, 24 L ed 214; Southern Pacific R. Co. v. United States, 168 US 1, 48, 18 S Ct. 42 L ed 355; Mercoid Corp. v. Mid-Continent Co., 320 US 661, 671,64 S Ct 268,88 L ed 376. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not as issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgments, §§ 68,69,70; Scott, Collateral Estoppel by Judgment, 56 Harv L Rev 1."

Hence, it may only be interpreted that defendant Fidelity seeks to evoke the related doctrine of collateral estoppel.

However, it also cannot be argued that plaintiffs are collaterally estopped from litigating their constitutional causes of action herein, since these constitutional issues were never litigated or adjudicated on their merits between the parties herein in the prior action.

Mr. Justice Tyler, in his decision to direct a sheriff to compel Mr. Overmyer to appear for examination, never adjudicated the constitutionality of the New York Judiciary Law. He merely stated that Vail did not apply to the case, since the Vail decision had been stayed. The constitutional causes of action in the instant action argue the merits of the constitutionality of the statutes pursuant to which defendant Fidelity had proceeded to enforce its New York judgment.

It was held in Clegg v. U.S., (1940) 112 F.2d 886, 887,

"Merits means the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction or form." (Footnote citations omitted).

Thus, the doctrine of either res judicata pursuant to which defendant Fidelity seeks the dismissal of the

constitutional causes of actions, or the doctrine of collateral estoppel cannot bar plaintiffs' action on the constitutional issues, since there was no similar cause of action either litigated or adjudicated in the prior action and the constitutional issues were never raised or argued on their merits. Therefore, it is respectfully requested that defendant Fidelity's motion to dismiss be denied and that plaintiffs' have their day in court to litigate the constitutional issues herein.

Respectfully submitted,

Easton & Echtman, P.C.  
Attorneys for Plaintiffs

Of Counsel,  
Irwin M. Echtman, Esq.  
Mark D. Mermel, Esq.

REPLY MEMORANDUM

JW:bc

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DANIEL H. OVERMYER and  
SHIRLEY OVERMYER,

76 CIV. 2876

Plaintiffs,

M. P.

- against -

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, THE STATE OF NEW YORK,  
THOMAS J. DELANEY, EDWARD A. PICHLER,  
and ANDREW R. TYLER,

Defendants.

REPLY MEMORANDUM  
IN SUPPORT OF  
MOTION TO DISMISS COMPLAINT

PRELIMINARY STATEMENT

This memorandum is submitted by Fidelity and Deposit Company of Maryland, (hereinafter referred to as "F & D"), in reply to the memorandum of law served and filed by plaintiff on October 13, 1976, and in further support of the motion by F & D to dismiss the complaint herein as against it.

It is respectfully requested that this memorandum

be read in conjunction with the Affidavit of Arthur Lambert sworn to October 1, 1976 and the memorandum of law in support of this motion, served and filed October 1, 1976, as well as the memorandum of law served and filed by F & D on September 22, 1976, in opposition to plaintiffs' motion for a preliminary injunction.

The facts of this action are before the Court as raised in the Lambert affidavit, and will not be repeated herein.

POINT I

THE CLAIM FOR DAMAGES MUST  
BE DISMISSED

As set forth in F & D's previous memorandum of law and the affidavit of Arthur Lambert, submitted in support of this motion, plaintiffs have already litigated the issues and claims contained in this law suit. The issues and claims that plaintiffs are attempting to litigate herein have already been determined in a prior action entitled "Fidelity and Deposit Company of Maryland v. Daniel H. Overmyer, Shirley Overmyer, and Overmyer Distribution Services, Inc.," and have been merged into a judgment entered in favor of F & D against the Overmyers on November 19, 1974, in the Supreme Court of the State of New York, County of New York. In this action, plaintiffs are in essence, seeking to attack F & D's claim against the plaintiffs, specifically their obligation to indemnify F & D for a payment it made to Eliot Realty Co., Inc. by virtue of a judgment rendered against Overmyer Distribution Services, Inc., and F & D, rendered by the County Court, Dallas County, Texas.

We respectfully submit that the instant action is merely a thinly disguised attack on matters previously

adjudicated and resolved, and is barred by res judicata.

In Saylor v. Lindsley, 391 F.2d 965 (2d Cir. 1968).

Judge Anderson described the elements of res judicata as follows:

The general rule of res judicata is that a valid, final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not, actually raised and decided in that action. The first judgment, when final and on the merits, thus puts an end to the whole cause of action. See Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1877); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715 92 L.Ed. 898 (1948); 1B Moore's Federal Practice ¶0.405 [1] (1965 ed.).

"The requirement that a judgment, to be res judicata, must be rendered 'on the merits' guarantees to every plaintiff the right once to be heard on the substance of his claim." (Emphasis added) 391 F.2d at 968.

Each aspect of this test is met here.

The Supreme Court has observed that the principles of res judicata "as founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in Court to present his case, is fully heard, and the contested issues decided against him, he may not later review the litigation in another court"

Heiserd v. Woodruff, 327 U.S. 726, 733 (1946).

It is readily apparent that the plaintiff has already litigated the identical issues herein, and accordingly, the within action should be dismissed as there already has been a determination and a final judgment on the merits, which precludes the collateral attack attempted here.

POINT II

As set forth in the memorandum of law in opposition to plaintiffs' motion for a preliminary injunction (see pp. 16 - 17 and appendix B), in the Lambert affidavit (pp. 5-6) and in the memorandum of law in support of this motion, plaintiffs have already litigated the constitutional issues herein, and are precluded from relitigating them herein. Furthermore, as set forth in the memorandum in opposition to plaintiffs' motion, the alleged constitutional claims are totally lacking in legal merit, and should therefore be dismissed upon this motion.

Plaintiffs nevertheless seek to "have their day in court to litigate the constitutional issues herein," upon the ground that their (admitted) assertion of a constitutional claim based on Vail v. Quinlan, in the Supreme Court of the State of New York, County of New York, and the rejection of this claim by (defendant) Justice Tyler, is not a bar to assertion of the claim herein, because it was not determined "on the merits." First, this is not true: Justice Tyler rejected the constitutional claim on the merits. Second, plaintiffs are barred in any event from relitigating this claim by the principle of collateral

estoppel.

In his memorandum decision dated May 24, 1976, Justice Tyler granted F & D's motion, and directed the Sheriff to apprehend Daniel H. Overmyer and compel him to appear for examination. Justice Tyler stated "It is the contention of Overmyer that the Vail decision precludes the grant of the instant motion, and it must therefore be denied as a matter of law." Justice Tyler then cited Walker v. Walker, \_\_\_\_ AD2d \_\_\_\_, 381 NYS2d 311 (Second Dept., 1976) and held with respect to Vail, "nor does it apply to the case at bar."

In Walker, supra, the contemnor sought to avoid imprisonment, based on Vail. The Appellate Division observed:

"Here, appellant received all of the due process rights which were denied to the plaintiff in Vail. He had been previously imprisoned for violation of the alimony judgment, he was served with proper process bringing on this proceeding and he was represented by counsel who appeared and argued on his behalf. Thus, all of the alleged infirmities in the statutes held unconstitutional in Vail are not here applicable. The court there was dealing with a defaulting, impecunious debtor who did not appear at the statutorily guaranteed hearing, who was without any knowledge of the possible consequences to him and who had no counsel. The facts here are the opposite."

Thus, it is clear that Justice Tyler reached the same conclusion as the Court reached in Walker, that Overmyer was not protected by Vail, because of differences in the factual circumstances. Therefore, this determination of Overmyer's constitutional claims was based on consideration of the facts and the law, and was on the merits, conclusively binding Overmyer, and barring the reassertion of these claims in this action.

The purpose of the principles of collateral estoppel and res judicata, is to safeguard the finality of litigated determinations, and to protect parties from repetitive and vexatious litigation. Plaintiff and F & D have already litigated the fact of Overmyer's contempt, and the proper remedy therefor, and this litigation has resulted in a final order reinstated after reargument, from which no appeal has been taken. As set forth above, plaintiffs raised, and the court decided the constitutional issue. Even if it had not been raised, the final order would preclude plaintiffs from raising this issue, since it could have been raised.

Plaintiffs are estopped to litigate any matters actually litigated in the previous New York action or any matters that might have been litigated therein. Saylor v.

Lindsley, 391 F.2d 965 (2d Cir. 1968). Furthermore, pursuant to the principles of collateral estoppel, plaintiffs are barred from attacking the orders rendered in the Supreme Court of the State of New York, requiring the plaintiffs to submit to examinations in supplementary proceedings, since the validity of the statutes and the orders it is seeking to attack in these proceedings, were actually litigated in the State Court proceedings, 1B Moore's Federal Practice, ¶ 0.412[1]; Scooper Dooper Inc. v. Kraft Co., 494 F. 2d 840, 844 (3rd Cir. 1974).

The assertion of the constitutional claims in this court amount to a collateral attack, and are barred by the principle of res judicata. Therefore, plaintiffs' constitutional claims and the entire complaint herein should be dismissed.

CONCLUSION

For all the foregoing reasons, and for the reasons previously set forth herein, the complaint herein should be dismissed as against defendant Fidelity and Deposit Company of Maryland.

Respectfully Submitted,

HENDLER & MURRAY  
Attorneys for Defendant,  
Fidelity & Deposit Company  
of Maryland

Jason Wallach  
Of Counsel

MEMORANDUM DECISION DENYING MOTION FOR PRELIMINARY  
INJUNCTION AND DISMISSING COMPLAINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DANIEL H. OVERMYER and SHIRLEY OVERMYER, :  
Plaintiffs,

v.

FIDELITY AND DEPOSIT COMPANY OF : 76 CIV. 2876(MP)  
MARYLAND, THE STATE OF NEW YORK, :  
THOMAS J. DELANEY, EDWARD A. PICKLER :  
and ANDREW R. TYLER, :  
Defendants.

MEMORANDUM

APPEARANCES:

EASTON & ECHTMAN, P.C.  
Attorneys for Plaintiffs  
6 East 39th Street, New York, N.Y. 10016

HENDLER & MURRAY, ESQS.  
Attorneys for Defendant (Fidelity and Deposit  
Company of Maryland)  
15 Park Row, New York, N.Y. 10038

LOUIS J. LEFKOWITZ  
Attorney General of the State of New York  
Attorneys for Defendants (New York State and  
Andrew R. Tyler)  
Two World Trade Center, New York, N.Y. 10047  
By: A. Seth Greenwald, Esq.

GERALD HARRIS, ESQ.  
Attorney for Defendant (Thomas J. Delaney)  
County Office Building  
White Plains, New York 10601

MILTON POLLACK, District Judge.

MILTON POLLACK, District Judge.

Plaintiffs move for a preliminary injunction pursuant to Rule 65 Fed. R. Civ. P. In addition to opposing that motion defendant cross moves for ~~dismissal~~ of the complaint on the grounds of insufficiency, Rule 12, and that this Court should abstain from taking jurisdiction over the matter herein.

Plaintiffs seek to enjoin defendant from going forward with proceedings supplementary to a state money judgment obtained against them by the defendant, contending that, the state statutes relating to contempts, Article 19 Sections 756, etc. New York State Judiciary Law which permit fines and apprehension of the plaintiff by the Sheriff are invoked herein and are violative of the due process clause and are unconstitutional. Plaintiffs rely on Vail v. Quinlan recently decided by a 3-Judge District Court, 406 F. Supp. 951 (S.D.N.Y. 1976) presently on appeal to the U.S. Supreme Court, sub nom. Giudice v. Vail, No. A-683, which found that state law to be unconstitutional as there applied.

This case arises out of the following facts.

Overmyer Distribution Services, Inc. was cast in judgment for the sum of \$28,092.25 on October 12, 1973 in the Justice Court of Dallas County, Texas, Precinct One, on October 12, 1973. The judgment debtor took an appeal and posted an indemnity appeal bond issued by the defendant herein to procure a stay pending that appeal.

During the pendency of the appeal the appellant's counsel allegedly withdrew and left appellant unprotected and the defendant surety allegedly then arranged for counsel and ultimately for the settlement of the judgment at a reduced sum and the withdrawal of the appeal. The defendant paid the amount of the settlement and thereafter sued the plaintiffs herein in the New York State Supreme Court pursuant to an indemnity agreement between the parties for reimbursement of the sum paid by it in the settlement of the Texas action. Defendant obtained a summary judgment for \$27,973.83 from New York State Supreme Court on November 19, 1974 in defendant's favor against the plaintiffs and the Overmyer Distribution Services, Inc., jointly and severally.

On December 2, 1974 the defendant subpoenaed

plaintiff, Daniel H. Overmyer, to appear for examination in supplementary proceedings on the New York judgment.

Overmyer failed to appear and on motion duly made on notice an order was made by the New York Court adjudging him in contempt, fining him \$250. plus \$10. costs and giving him an opportunity to purge his contempt by appearing and submitting to examination. He paid the fine but did not appear for examination. A motion was made on notice for his apprehension by the Sheriff of New York County and an order was issued thereon, on notice, by State Court Justice Tyler directing the apprehension of Daniel H. Overmyer by the Sheriff of any county and his delivery to court for examination by defendant Fidelity under oath on August 31, 1976 or any court day thereafter until Overmyer shall actually be examined. This injunction suit followed.

Overmyer contends in his complaint herein that he is unable to post a bond to forestall his commitment and that his apprehension by a Sheriff would be violative of the Equal Protection clause of the Fourteenth Amendment

and in violation of the Eighth Amendment's ban against cruel and unusual punishment and also (somehow) in violation of the due process mandated by the Fifth and Fourteenth Amendments.

Underlying those contentions is Overmyer's claim that the Texas proceedings which resulted in the New York judgment were infirm in that the Overmyer Corporation had no counsel on the appeal through alleged subversion of its rights by defendant.

The relief sought by the complaint herein is to have a three-judge district court convened; to have an injunction entered against enforcement of civil contempt proceedings against plaintiff under Article 19 of the New York State Judiciary Law and to prevent apprehension and commitment of Overmyer; to have the State statutes relating to civil contempts declared unconstitutional; and to assess \$100,000. damages against the defendant and return to plaintiff the \$260. directed to be paid on the contempt order mentioned above.

Plaintiffs rely for the relief they seek on the ruling in Vail v. Quinlan, supra, enjoining as unconstitutional the sections of the Judiciary Law said to be here invoked, which permit a judgment debtor who has failed to comply with a disclosure subpoena concerning his ability to satisfy a judgment debt, to be held in contempt, fined and imprisoned without notice or warning of consequences of failure to appear at the show cause hearing.

By order of Mr. Justice Thurgood Marshall, dated February 12, 1976 the enforcement of the injunction granted in Vail v. Quinlan against enforcement of Article 19 of the New York Judiciary Law was stayed pending the appeal therefrom to the U.S. Supreme Court and defendant consequently contends that if Vail be deemed applicable here, it is in no event a basis for the relief plaintiff seeks. More particularly, defendant contends that contrary to the situation in Vail, it is not sought to subject Overmyer to incarceration by the pending subpoena; and that he has been given notice that the purpose of the relief sought is only to convoy him to Court in order to be questioned as a witness as directed by the Court. The state court order herein was not, as was the order in Vail, obtained ex parte, but was

obtained on notice, after hearing and rehearing.

NYCPLR § 2308(a) entitled "Disobedience of Subpoena" provides that "A court may issue a warrant directing a sheriff to bring the witness into court."

Overmyer's incredible procedures to avoid a court appearance pursuant to a subpoena was commented on appositely by Justice Tyler in his memorandum dated June 23, 1976:

This Court finds the litany of evasion and non-compliance in which the defendant judgment debtor has engaged to be absolutely incredible. The utter disrespect which Overmyer has shown, not just for the prior order of this Court, but for the entire system of jurisprudence by which this Court and this society operates is reprehensible.

Suffice it to say that this Court finds no constitutional infirmity in the use of the Court's power to order a witness to appear in Court to be examined under oath. That is the first step -- we do not reach the further matter of imprisonment for contempt herein since the orders thus far direct only that the sheriff bring Overmyer to Court -- that is a coercive power without constitutional taint in the view of this Court.

The action of the state courts in this situation thus far does not invoke the state statutes on contempts; it relates solely to implementing an order directing the production of a witness in court to testify pursuant to a court command issued on notice to appear for that purpose.

The plaintiffs have attempted to confuse the statute applicable to the factual situation here -- as to which no substantial constitutional question is raised [NYCPLR §2308(a)] -- with other statutes relating to proceedings supplementary to judgments as to which constitutional question has -- in certain respects -- been raised in Vail. The complaint herein by conclusory allegations raises a sham issue in the light of the evidence submitted on the application for temporary and preliminary injunctive relief. Such a tactic does not entitle plaintiffs to an injunction or the convening of a three-judge court on the actual controversy involved. Plaintiffs do not satisfy the criteria for injunctive relief on the actual matter involved, viz., probability of success on the merits by raising a semantic semblance to an irrelevant constitutional question; and the equities certainly do not preponderate in favor of plaintiffs on

any doubtful question pertaining to the relevant statute. Premature constitutional adjudication should be avoided. Kusper v. Pontikes, 414 U.S. 51, 54-55 (1973); Harman v. Forssenius, 380 U.S. 528, 534 (1965).

Since the factual situation exposed in the record does not support the conclusory charge in the complaint that the case presently involves imprisonment or threat thereof, the sufficiency of the complaint may properly be examined on the motion for a preliminary injunction.

Standard Oil Co. v. Lopena Gas Co., 240 F.2d 504, 510 (5th Cir. 1957); Concerned Citizens for Neighborhood Schools, Inc. v. Board of Education, 379 F. Supp. 1233, 1238 (E.D. Tenn. 1974); Wright & Miller, Federal Practice and Procedure: Civil §2950, at 490. Cf. Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 952 (2d Cir. 1969).

In no event could plaintiffs litigate in this Court the conclusory claims of unconstitutionality which, as stated above, the facts indicate are not issuable in this case.

The plaintiff has heretofore in a court of competent jurisdiction in a suit between the same parties litigated the identical issues, including unconstitutionality of the

state statutes presented by plaintiffs herein. The determination in the state court was adverse to the plaintiffs and in favor of the defendant and a final judgment was rendered accordingly on the merits. This precludes the collateral attack attempted here even if the facts permitted such attack. Heiser v. Woodruff, 327 U.S. 726, 733 (1946); Saylor v. Lindsley, 391 F.2d 965, 968 (2d Cir. 1968).

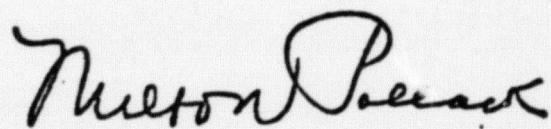
The state court was presented with the issue of constitutionality attempted to be presented here -- but that issue was decided adversely to plaintiffs by the state court, on the merits. The force of the Vail decision was evaluated on the facts and law by the state court and found wanting, the state court citing as controlling, Walker v. Walker, \_\_\_\_ A.D.2d \_\_\_, 381 N.Y.S. 2d 310 (2d Dept. 1976). The holding in the state court was that Overmyer was not protected by Vail, because of differences in the factual circumstances.

Where the same question of constitutionality was at issue and determined against the plaintiffs in a state court, res judicata bars the plaintiffs from again litigating that issue in federal court. Thistlethwaite (362 F. Supp. 88 (S.D.N.Y. 1973), aff'd, v. City of New York, 497 F.2d 339 (2d Cir.), cert. denied,

419 U.S. 1093 (1974).

Preliminary injunction denied. Complaint dismissed.

SO ORDERED.



United States District Judge

Dated: October 18<sup>th</sup>, 1976.  
New York, N.Y.

-11-

A141

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

-----x

DANIEL H. OVERMYER and SHIRLEY  
OVERMYER,

76 Civ. 2876

Plaintiffs,

JUDGE POLLACK

-against-

NOTICE OF APPEAL

FIDELITY AND DEPOS ~~COMPANY~~ OF  
MARYLAND, THE STATE OF NEW YORK,  
THOMAS J. DELANEY, EDWARD A. PICKLER  
and ANDREW R. TYLER,

Defendants.

-----x

Notice is hereby given that DANIEL H. OVERMYER and SHIRLEY  
OVERMYER, plaintiffs above named, hereby appeal to the United  
States Court of Appeals for the Second Circuit from the  
final judgment entered in this action on the 18th day of  
October, 1976.

Dated: New York, New York  
November 12, 1976

EASTON & ECHTMAN, P.C.

BY: Shirley Overmyer

A member of the firm  
Attorneys for Plaintiffs  
6 East 39th Street  
New York, New York 10016